122 441

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 293.

GEORGE W. PAXTON, JACOB C. LEHMAN, JAMES H. WALTER, EUGENE A. GROVE, JACOB E. BARNITZ, ELIAS FISHER, AND THOMAS CREARY, PLAINTIFFS IN ERROR,

vs.

CHARLES GRISWOLD, LILLIE ANN GRISWOLD, AND JOHN C. GRISWOLD, CHILDREN AND HEIRS-AT-LAW OF JOHN GRISWOLD, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED SEPTEMBER 12, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 293.

GEORGE W. PAXTON, JACOB C. LEHMAN, JAMES H. WALTER, EUGENE A. GROVE, JACOB E. BARNITZ, ELIAS FISHER, AND THOMAS CREARY, PLAINTIFFS IN ERROR,

vs.

CHARLES GRISWOLD, LILLIE ANN GRISWOLD, AND JOHN C. GRISWOLD, CHILDREN AND HEIRS-AT-LAW OF JOHN GRISWOLD, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation and service	2	1
Caption	3	2
Summons in ejectment	5	2
Description and valuation	7	4
Plea	9	5
Commission to take testimony	10	5
Interrogatories	11	6
Cross-interrogatories	14	7
Testimony of Julia Ann Carey	18	8
Michael Finnegan	23	9
Bridget Cronin	28	11
Jeremiah Cronin	33	12
Christopher Carey	38	14
John Senter	44	15
Mark Matthews	49	17
Jury called	55	18
Order for verdict	56	19

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Verdict	58	19
Motions and reasons for new trial	59	19
Order overruling motion for new trial	62	20
Judgment	62	20
Bill of exceptions	63	21
Plaintiffs' offers	64	21
Defendants' offers	65	21
Charge	67	23
Griswold warrant and survey	69	23
Griswold's patent	72	24
Cookson warrant	75	25
Certificate of payment by Cookson	77	26
Bond	80	28
Clerk's certificate	82	28

1 UNITED STATES, } *sct:*
Eastern District of Pennsylvania, }

The President of the United States to the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, Greeting:

Because that in the record and process and also in the rendering of judgment in a suit before you, between Charles Griswold, a citizen of the State of Ohio, Lillie Ann Griswold, a citizen of the State of Wisconsin, and John C. Griswold, a citizen of the State of Michigan, children and heirs-at-law of John Griswold, deceased, plaintiffs, and George W. Paxton, Jacob C. Lehman, James H. Walter, Eugene A. Grove, Jacob E. Barnitz, Elias Fisher, and Thomas Creary, citizens of Cumberland county, Pennsylvania, defendants in a plea of ejectment, a manifest error has intervened, to the great damage of the said George W. Paxton, Jacob E. Lehman, James H. Walter, Eugene A. Grove, Jacob E. Barnitz, Elias Fisher, and Thomas Creary, as in their complaint has been stated, and it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then, under your seal, do you, distinctly and openly, send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the honorable the justices of the Supreme Court of the United States, sitting at Washington, D. C., on the second Monday of October next, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this twenty-fifth day of April, A. D. one thousand eight hundred and eighty-four, and in the one hundredth and eighth year of the Independence of the United States.

SAMUEL BELL,
Clerk of the Circuit Court U. S.

[Seal U.S. Circuit Court, E. D. Pennsylvania.]

2 THE UNITED STATES OF AMERICA, *ss:*

To Charles Griswold, a citizen of the State of Ohio, Lillie Ann Griswold, a citizen of the State of Wisconsin, and John C. Griswold, a citizen of the State of Michigan, children and heirs-at-law of John Griswold, dec'd, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, wherein George W. Paxton, Jacob C. Lehman, James H. Walter, Eugene A. Grove, Jacob E. Barnitz, Elias Fisher, and Thomas Creary are plain-

tiffs and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in said writ of error mentioned, shall not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 12th day of May, in the year of our Lord one thousand eight hundred and 84.

WM. BUTLER, *Judge.*

Notice accepted.
13th May, 1884.

SAM'L HEPBURN,
Att'y for Deft's in Error.

3 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

CHARLES GRISWOLD, a Citizen of the State of Ohio, LILLIE ANN Griswold, a Citizen of the State of Wisconsin, and John C. Griswold, a Citizen of the State of Michigan, Children and Heirs-at-Law of John Griswold, Deceased,

vs.

GEORGE W. PAXTON, JACOB C. LEHMAN, JAMES H. WALTER, EUGENE A. Grove, Jacob E. Barnitz, Elias Fisher, and Thomas Creary, Citizens of Cumberland County, Pennsylvania.

Ejectment.

UNITED STATES OF AMERICA, } *ss:*
Eastern District of Pennsylvania, }

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit of April session, 1882, No. 44.

It is thus contained:

Be it remembered that on the 3rd day of August, A. D. 1882, the plaintiffs, by their attorneys, James H. Campbell, George Bull,
4 and Samuel Hepburn, Esquires, came into court here and sue-forth therefrom a writ of summons in ejectment against the above-named defendants, which, with the endorsement and return thereto, is in the words and figures following, to wit:

5 UNITED STATES, } *sct:*
Eastern District of Pennsylvania, }

The President of the United States to the marshal of the eastern district of Pennsylvania, Greeting:

We command you that you summon George W. Paxton, Jacob C. Lehman, James H. Walter, Eugene A. Grove, Jacob E.
[SEAL.] Barnitz, Elias Fisher, and Thomas Creary, citizens of Cumberland county, Pennsylvania, late of your district, if they may be found therein, so that they be and appear before the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, at a session of the same

court, to be holden at Philadelphia, on the first Monday of September next, then and there to answer to a certain complaint made by Charles Griswold, a citizen of the State of Ohio, Lillie Ann Griswold, a citizen of the State of Wisconsin, and John C. Griswold, a citizen of the State of Michigan, children and heirs-at-law of John Griswold, deceased; that the said defendants now have in their actual possession the following tract of land in Dickinson and South Middleton townships, Cumberland county, Pennsylvania, bounded on the north by tracts of land surveyed in name- of Jacob Ritner and Thomas Cookson, on the east by tract of land surveyed in name of Michael Ege, on the south by tract of land surveyed in name of William Cox, and on the west by tract of land surveyed in name of Frederick C. Kropff, containing four hundred and five acres and one hundred and thirty-eight perches and allowance, the right of possession or title to which the said plaintiffs say is in them and not in the said defendants; all which they the said plaintiffs aver they are prepared to prove before our said court. Hereof fail not, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this third day of August, A. D. 1882, and in the 107th year of the Independence of the United States.

August 3, 1882.

W. VON A. WILLIAMSON,
Pro Clerk of Circuit Court U. S.

6 I hereby deputize A. A. Thompson, sheriff of Cumberland county, to serve the within writ.

JAMES U. KERNS,
U. S. Marshal,
Per THOS. MARPLE, *Deputy.*

Pennsylvania, Eastern District U. S. C. C.

CUMBERLAND COUNTY, *ss:*

Personally appeared before me, a justice of the peace in and for said county, A. A. Thompson, high sheriff of Cumberland county, Pennsylvania, who, being duly sworn, says that he served the within writ of ejectment upon each one of the defendants named therein by reading said writ to each of them and within hearing *by* each and by giving each one of them a true copy thereof.

A. A. THOMPSON,
Sheriff, &c.

Sworn and subscribed before me this 7th day of August, 1882.
GEORGE H. HEPBURN, *J. P.* [SEAL.]

[Endorsed:] No. 44. Circuit court U. S., Ap'l sess., 1882. Griswold *et al.* [*vs.*] Paxton *et al.* Summons in ejectment. Returnable on the first Monday of September next. James H. Campbell, Geo. Ball, attorney for plaintiff. Returned & filed September 4, 1882.

7 And afterwards, to wit, on the 5th day of September, A. D. 1882, came the plaintiffs, by their attorneys, and file- a description and valuation in the words and figures following, to wit:

In the Circuit Court of the United States, Eastern District of Pennsylvania. April Sessions, 1882.

CHARLES GRISWOLD, a Citizen of the State of Ohio; LILLIE Ann Griswold, a Citizen of the State of Wisconsin, and John C. Griswold, a Citizen of the State of Michigan, Children and Heirs-at-Law of John Griswold, Deceased,

vs.

GEORGE W. PAXTON, JACOB C. LEHMAN, JAMES H. WALter, Eugene A. Grove, Jacob E. Barnitz, Elias Fisher, and Thomas Creary, Citizens of Cumberland County, Pennsylvania.

No. 44.

Ejectment.

This action of ejectment is brought to recover possession of a tract of land described as follows: Situated in Dickinson and South Middleton townships, Cumberland county, Pennsylvania, beginning at a post on the corner of the William Cox and Frederick C. Kropff surveys; thence north by Kropff's and John Stoney's surveys nine degrees west one hundred and twenty-one and five-tenths perches to stones; thence north by Jacob Ritner's survey fifty-two de-
8 grees east three hundred and ninety perches to a small pine; thence south by Thomas Cookson survey forty-nine degrees east one hundred and forty-four and five-tenths perches to a small white oak; thence south by Michal Ege survey sixteen degrees east sixty-five perches to a post, late a pine, corner of Michael Ege and William Cox surveys; thence by William Cox survey south sixty-four degrees west four hundred and sixty-two perches to a post, the place of beginning, containing four hundred and five acres and one hundred and thirty-eight perches, and allowance, of the value of ten thousand dollars, the right of possession or title to which the plaintiffs aver is in them and not in the said defendants, as they are prepared to prove.

JAMES H. CAMPBELL,
GEO. BULL,
Attorneys for Plaintiffs.

(Endorsed:) 44. April sess., 1882. U. S. cir. c't. Griswold *et al. vs.* Paxton *et al.* Description and valuation. Filed September 5, 1882. Hepburn, Campbell, [and] Bull, for pl'ffs.

9 And afterwards, to wit, on the 8th day of September, A. D. 1882, came the defendants, by their attorneys, S. Hepburn, Jr., W. F. Sadler, and Lemuel Todd, Esquires, and file- their plea in the words following, to wit:

In the Circuit Court of the United States, Eastern District of Pennsylvania. April Sess., 1882.

CHARLES GRISWOLD *et al.*
vs.
GEO. W. PAXTON *et al.* } No. 44.

SEPTEMBER 7TH, 1882.

Defendants plead "not guilty."
Sept. 7th, 1882.

S. HEPBURN, JR.,
W. S. SADLER,
LEMUEL TODD,
Att'ys for Def'ts.

(Endorsed:) No. 44. April sess., 1882. Griswold *et al. vs.* Paxton *et al.* Def'ts' plea. Filed September 8th, 1882. Hepburn, Jr., & Sadler [and] Todd.

10 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit, of April Session, 1882.

CHARLES GRISWOLD, a Citizen of Ohio; LILLIE ANN GRISwold, a Citizen of Wisconsin, & John C. Griswold, a Citizen of Michigan, Children and Heirs-at-Law of John Griswold, Dec'd,
vs.
GEORGE W. PAXTON, JACOB C. LEHMAN, JAMES WALters, Eugene A. Grove, Jacob E. Barnitz, Elias Fisher, and Thomas Creary, Citizens of Pennsylvania. } No. 44.

The President of the United States to Allen F. Rees, Esq., Houghton, Michigan:

Know ye, that in confidence of your prudence and integrity we have given unto you, and by these presents do give unto you, Allen F. Rees, Esq., full power and authority, in pursuance of a rule lately made in the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a certain action in ejectment therein depending, wherein the said Charles Griswold *et al.* are plaintiffs and George W. Paxton *et al.* are defendants, to call before you at a certain day and place, by you for that purpose to be appointed, all and every person and persons who may be named to you by the said plaintiffs as witnesses in the said action, and then and there to examine them, on their respective oath or affirmation, on certain interrogatories hereunto annexed touching the premises, and to reduce their testimony to writing; and when you shall have

so done you are to send the same to the said circuit court, closed up and under your seals, plainly and distinctly set, together with this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this 28th day of October, A. D. 1882, and in the 107th year of the Independence of the said United States.

[SEAL.]

SAMUEL BELL,
Clerk of Circuit Court.

11 U. S. C. C., April Session, 1882.

CHARLES C. GRISWOLD, a Citizen of Ohio; LILLIE ANN Griswold, a Citizen of Wisconsin, and John C. Griswold, a Citizen of Michigan, Children and Heirs-at-Law of John Griswold, Dec'd,
vs.
GEORGE W. PAXTON, JACOB C. LEHMAN, JAMES WALTERS, Eugene A. Grove, Jacob E. Barnitz, Elias Fisher, and Thomas Creary, Citizens of Cumberland county, Pennsylvania.
} No. 44.

Enter rule for a commission to issue to Allen F. Rees, Esq., of Houghton, Michigan, to take the testimony of Julia A. Carey and others upon the following interrogatories:

First interrogatory. What is your name, age, and where do you reside?

Second interrogatory. Do you know the plaintiffs in this suit?

Third interrogatory. Did you know their father and mother? If so, state their names and the name of their mother before she
12 was married, where they were married, and by whom.

Fourth interrogatory. Are their parents living or dead? If their father is dead, state where he died.

Fifth interrogatory. How many children did they have; what are their names, and when did the youngest arrive at the age of twenty-one years?

Sixth interrogatory. Where do they reside?

Seventh interrogatory. Do you know of any relationship between the father of the plaintiffs and Paul D. Geisse? If so, please state what it was.

Eighth interrogatory. Do you know where the father of plaintiffs lived during the years 1846, 1847, 1848, and 1849? If so, state where, in what business he was engaged, and with whom.

Ninth interrogatory. Where did the plaintiffs' father live from that time until his death?

Sept'r 29th, 1882.

GEO. BULL,
JAMES H. CAMPBELL,
SAM'L HEPBURN,
Atty's for Pl'ffs.

13 (Endorsed:) 44. April sess., 1882. U. S. C. C. Griswold *vs.* Paxton *et al.* Interrogatories on the part of pl'ffs.

SEPT'R 30, 1882.

We accept service for def'ts and waive entry of rule & service of same.

S. HEPBURN, JR.,
W. F. SADLER,
LEMUEL TODD,
Atty's for Def'ts.

Filed October 17, 1882.

14 In the Circuit Court of the U. S., Eastern Dist. of Penna.
April Session, 1882.

CHARLES GRISWOLD *et al.*
vs.
GEO. W. PAXTON *et al.* } No. 44.

Cross-interrogatories to witnesses to be examined by Allen F. Rees, Esq., of Houghton, Michigan, commissioner, &c., appointed on rule entered by the pl'ffs.

First. When and where did you first make the acquaintance of John Griswold and his wife, the parents of the pl'ffs?

Second. In what State, county, and town did John Griswold and his wife live when you first made their acquaintance, and where did they live before they moved to the West?

Third. What was Mrs. Griswold's maiden or other name before her marriage with Jno. Griswold?

Fourth. In what State, county, and town was she born and did she live prior to her marriage with Jno. Griswold?

15 Fifth. Have you a photograph or other likeness of Mrs. Griswold, the mother of the pl'ffs, or can you produce one? If so, have it attached to your deposition.

Sixth. If you attach no photograph or other likeness to your deposition, describe Mrs. Griswold, the mother of the pl'ffs, as accurately as you can do so, her person, height, color of her complexion, hair, eyes, and any peculiarity, if she had one.

Seventh. When you first knew Jno. Griswold and wife were any of the plaintiffs born; if so, which ones and what were their ages?

Eighth. When and where did Jno. Griswold die?

Ninth. Is Mrs. Griswold, the mother of the plaintiffs, living; if so, where? If not, when and where did she die?

Tenth. What relation, if any, are you to the pl'ffs or to any
16 of them, and when and where were you born?

LEMUEL TODD,
S. HEPBURN, JR.,
W. F. SADLER,
Att'ys for Def'ts.

(Endorsed:) 44. April sess., 1882. U. S. C. C. Griswold *vs.* Paxton *et al.* Cross-interrogatories on part of the defendants. Filed October 17, 1882.

17 Depositions of witnesses produced, sworn, and examined on the 18th day of December, in the year of our Lord one thousand eight hundred and eighty-two, at the office of M. Van Orden, in the village of Houghton, in the county of Houghton, State of Michigan, under and by virtue of a commission issued out of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of April session, 1882, No. 44, to Allen F. Rees, directed for the examination of witnesses in a certain cause depending in said court, wherein Charles Griswold, a citizen of Ohio; Lillie Ann Griswold, a citizen of Wisconsin, and John C. Griswold, a citizen of Michigan, children and heirs-at-law of John Griswold, dec'd, are plaintiffs, and George W. Paxton, Jacob C. Lehman, James Walters, Eugene A. Grove, Jacob E. Barnitz, Elias Fisher, and Thomas Creary, citizens of Pennsylvania, are defendants.

ALLEN F. REES,
Commissioner.

18 JULIA ANN CAREY, housekeeper, aged fifty-two years and upwards, being duly sworn and examined on the part of the plaintiffs, doth depose and say as follows:

1st. To the first interrogatory she saith: My name is Julia Ann Carey; my age is fifty-two; I live at the Alloney mine, Keweenaw county, Mich.

2nd. To the second interrogatory she saith: I know all the plaintiffs in this suit.

3rd. To the third interrogatory she saith: I know both father and mother of the plaintiffs. The father was John Griswold and the mother was Julia Ann Griswold—that is myself. My name before being married was Julia Ann Laurie. We were married in Detroit, State of Michigan, by Squire Harris, a justice of the peace; John Laurie and Susan Laurie were present at my marriage.

4th. To the fourth interrogatory she saith: The father of these plaintiffs is dead, and has been dead several years ago; the
19 mother, of course, is still living; the father died at Eagle River, Keweenaw Co., Michigan; he died in December, 1860.

5th. To the fifth interrogatory she saith: They had three children; their names are Charles Griswold, Lillie Ann Griswold, and John C. Griswold; the youngest, John C. Griswold, was twenty-one years old on the 7th of January last, 1882.

6th. To the sixth interrogatory she saith: Charles Griswold is in Cleveland, Ohio; Lillie Ann Griswold is in Florence, Wisconsin, and John C. Griswold lives at Alloney, Michigan.

7th. To the 7th interrogatory she saith: Paul D. Geisse has married a sister of John Griswold, the father of the plaintiffs; Paul D. Geisse is a brother-in-law of John Griswold.

8. To the 8th interrogatory she saith: In 1846 John Griswold went to Pennsylvania with Paul D. Geisse; he was connected in business with Paul D. Geisse in iron works; he lived in
20 Cumberland county, Pennsylvania, until 1849, when he returned to Michigan. He was engaged in iron works with Paul D. Geisse.

9th. To the 9th interrogatory she saith: The father of plaintiffs lived from that time first at Eagle Harbor, Keweenaw county, Michigan, then at Eagle River, Keweenaw county, Michigan, until his death.

1st. To the first cross-interrogatory she saith: I first met John Griswold in the city of Detroit, Michigan, in 1846; I was his wife and the mother of the plaintiffs.

2nd. To the second cross-interrogatory she saith: When I first made the acquaintance of John Griswold we both lived in Detroit, county of Wayne, State of Michigan; we lived in Detroit before we came up to the lakes.

21 3rd. To the third cross-interrogatory she saith: My maiden name before my marriage to John Griswold was Julia Ann Laurie.

4th. To the fourth cross-interrogatory she saith: I was born in the city of Detroit, in Wayne county, in the State of Michigan, and I lived in Detroit up to the time I was married to John Griswold, when we moved to Eagle Harbor, in Keweenaw county, Michigan.

5th. To the fifth cross-interrogatory she saith: I have a photograph of Mrs. Griswold.

(Witness produces photograph, which is hereto attached.)

6th. To the sixth cross-interrogatory she saith: I have attached a photograph to my testimony.

7th. To the seventh cross-interrogatory she saith: When I first knew John Griswold none of the plaintiffs were born.

22 8th. To the eighth cross-interrogatory she saith: John Griswold died at Eagle River, Keweenaw county, Michigan, in 1860.

9th. To the 9th cross-interrogatory she saith: Mrs. Griswold, the mother of the plaintiffs, is still living. I am the mother of the plaintffis. I am living at the Alloney —, Keweenaw county, Michigan.

10th. To the 10th cross-interrogatory she saith: I am the mother of the plaintiffs. I was born in Detroit, county of Wayne, State of Michigan, in the year 1831.

her
JULIA ANN x CAREY.
mark.

Examination taken, reduced to writing, and the witness subscribed and sworn to this 18th day of December, 1882, before—

ALLEN F. REES,
Commissioner.

23 MICHAEL FINNEGAN, farmer, of Houghton, Houghton county, Michigan, aged sixty-one years and upwards, being duly sworn and examined on the part of the plaintiffs, doth depose and say as follows:

1st. To the first interrogatory he saith: My name is Michael Finnegan. I am sixty-one years of age. I live in Portage town-

ship, Houghton county, Michigan. I have lived in Houghton county since 1846 up to this time, and John Griswold lived in Houghton county since I first knew him until he died.

2nd. To the second interrogatory he saith: I knew the oldest boy, Charles Griswold, personally. I knew the other children, but couldn't say what their names were.

3rd. To the third interrogatory he saith: I knew their father and mother. John Griswold was the father of these children. I couldn't tell their mother's name. I do not know the name of their mother before she was married. I do not know where they were married nor by whom.

24 4th. To the fourth interrogatory he saith: Their mother is living; their father is dead. Their father died at Eagle River, in Keweenaw county, Michigan.

5th. To the fifth interrogatory he saith: I couldn't say how many children they had; I know they had more than one, because I always recollect that I couldn't tell the names of the children, except the oldest, Charles; I knew him personally; I can't tell when the youngest arrived at the age of twenty-one years.

6th. To the sixth interrogatory he saith: I do not know where the children reside.

7th. To the seventh interrogatory he saith: I do not know of any relationship between the father of the plaintiffs and Paul D. Geisse.

8th. To the eighth interrogatory he saith: I wasn't acquainted with the father of the plaintiffs as early as 1846, 1847, 1848, or 1849; I can't tell anything about him in those years.

25 9th. To the ninth interrogatory he saith: I first knew him about 1853 or 1854; since that time he lived part of the time at Eagle Harbor, Keweenaw county, and part of the time at Eagle River, Keweenaw county, where he was living when he died.

1st. To the first cross-interrogatory he saith: The first place I knew them was at Eagle Harbor.

2nd. To the second cross-interrogatory he saith: They lived in the township of Eagle Harbor, then in Houghton, but now in Keweenaw county, in the State of Michigan; I do not know where they lived before they came to the West.

3rd. To the third cross-interrogatory he saith: I do not know what Mrs. Griswold's maiden or other name was before her marriage with Jno. Griswold.

4th. To the fourth cross-interrogatory he saith: I do not
26 know where Mrs. Griswold lived prior to her marriage with Jno. Griswold nor where she was born.

5th. To the fifth cross-interrogatory he saith: I have no photograph of the mother of the plaintiffs nor any other likeness; I could not procure one that I know of.

6th. To the sixth cross-interrogatory he saith: She was a good medium size; she was about 5 ft. 5 inches in height; light complexion; her hair was rather light. I do not know the color of her eyes nor of any peculiarity about her.

7th. To the seventh cross-interrogatory he saith: When I first knew Jno. Griswold and wife Charles Griswold, one of the plaintiffs, the oldest child, was born. I do not know what his age was then; I do not know whether the others were born then or not.

8th. To the eighth cross-interrogatory he saith: John Griswold died at Eagle River, Keweenaw county, Mich., about the year 1880.

27 9th. To the ninth cross-interrogatory he saith: Mrs. Griswold, mother of the plaintiffs, is still living; she lives at the Alloney —, in Keweenaw county, Michigan.

10th. To the tenth cross-interrogatory he saith: I am no relation at all to the plaintiffs or any of them. I was born in 1821 in Ireland.

MICHAEL FINNEGAN.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 18th day of December, 1882, before—

ALLEN F. REES,
Commissoner.

28 BRIDGET CRONIN, housekeeper, of Eagle River, Keweenaw county, Michigan, aged forty-eight years and upwards, being duly sworn and examined on the part of the plaintiffs, doth depose and say as follows:

1st. To the first interrogatory she saith: My name is Bridget Cronin; my age is forty-eight years; I reside at Eagle River, Keweenaw, Michigan.

2nd. To the second interrogatory she saith: I know the plaintiffs in this suit.

3rd. To the third interrogatory she saith: I knew their father and mother. The father was John Griswold, and the mother was Julia Ann Griswold; their mother's name before she was married was Julia Ann Laurie; I do not know where they were married, nor by whom.

4th. To the fourth interrogatory she saith: The mother of plaintiffs is living, and the father is dead; he died at Eagle River, Keweenaw county, Michigan, in December, 1860.

29 5th. To the fifth interrogatory she saith: They had three children; their names are Charles Griswold, Lillie Ann Griswold, and John C. Griswold; the youngest was twenty-one years old last January, the 7th, I think.

6th. To the sixth interrogatory she saith: Charles resides in Ohio, Lillie Ann in Wisconsin, and John C. at the Alloney —, in Michigan.

7th. To the seventh interrogatory she saith: I do not know of any relationship between the father and Paul D. Geisse.

8th. To the 8th interrogatory she saith: I do not know where the father lived during the years 1846, 1847, 1848, and 1849; I know nothing about him at that time.

9th. To the 9th interrogatory she saith: From the time I knew him, when he came on the lake, he lived at Eagle Harbor and Eagle River, in Keweenaw county, Michigan, until the time of his death.

30 1st. To the first cross-interrogatory she saith: I first made the acquaintance of John Griswold and his wife at Eagle River in 1858.

2nd. To the second cross-interrogatory she saith: When I first made their acquaintance John Griswold and his wife lived at Eagle River, then in Houghton county, but now in Keweenaw county, in Michigan; I don't know where they lived before they moved to the lakes.

3rd. To the third cross-interrogatory she saith: Mrs. Griswold's maiden name before her marriage to John Griswold was Julia Ann Laurie.

4th. To the 4th cross-interrogatory she saith: I do not know when she was born, nor where she lived before her marriage with John Griswold.

5th. To the 5th cross-interrogatory she saith: I haven't any photograph of Mrs. Griswold here.

6th. To the 6th cross-interrogatory she saith: She is a medium-sized woman, with light hair, hazel-colored eyes; about five
31 feet four or four and one-half inches in height; fair complexion; rather a friendly disposition, and lively.

7th. To the 7th cross-interrogatory she saith: When I first knew Jno. Griswold and wife two of the plaintiffs were born, Charles and Lillie Ann; I do not know what their ages were.

8th. To the eighth cross-interrogatory she saith: John Griswold died at Eagle River, Keweenaw county, Michigan, in December, 1860.

9th. To the 9th cross-interrogatory she saith: Mrs. Griswold, the mother of the plaintiff, is still living. She is living at the Alloney —, in Keweenaw county, Michigan; she is now married to Christopher Carey.

10th. To the tenth cross-interrogatory she saith: I am no relation to the plaintiffs or to any of them. I was born in Ireland in 1834.

32 BRIDGET CRONIN.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 18th day of December, 1882, before—

ALLEN F. REESE,
Commissioner.

33 JEREMIAH CRONIN, owner & driver of stage of Eagle River, Keweenaw county, Michigan, aged fifty-four years and upwards, being duly sworn and examined on the part of the plaintiffs, doth depose and say as follows:

1st. To the first interrogatory he saith: My name is Jeremiah Cronin; my age is fifty-four years old; and I reside now at Eagle River, Keweenaw, Michigan.

2nd. To the second interrogatory he saith: I know the plaintiffs in this suit.

3rd. To the third interrogatory he saith: I knew their father and mother, their names were John Griswold, and his wife's name I did

not know; I used to call her Mrs. Griswold all the time; I do not know her name before she was married, nor where they were married, nor by whom.

4th. To the 4th interrogatory he saith: The father of the
34 plaintiffs is dead. The father died at Eagle River in the winter of 1860; I believe some time in December.

5th. To the fifth interrogatory he saith: They had three children; they are Charles, Lillie, and John; John, the youngest, must have been 21 years of age some time last January.

6th. To the sixth interrogatory he saith: Charles is in Cleveland, Ohio; John is at the Alloney —, Keweenaw county, Michigan, and where Lillie is I don't know.

7th. To the 7th interrogatory he saith: I do not know of any relationship between the father of the plaintiffs and Paul D. Geisse.

8th. To the 8th interrogatory he saith: I do not know where the father of plaintiffs lived in 1846, 1847, 1848, and 1849, nor what business he was engaged in nor with whom.

9th. To the 9th interrogatory he saith: Since I first knew
35 him in about '52 he lived at Eagle River, in Keweenaw county, Michigan, until his death.

1st. To the first cross-interrogatory he saith: I first made the acquaintance of John Griswold and his wife at Eagle Harbor in about 1852.

2nd. To the second cross-interrogatory he saith: They lived when I first made their acquaintance in Eagle Harbor township, Houghton county, now Keweenaw county, State of Michigan. I don't know where they lived before they moved up here.

3rd. To the third cross-interrogatory he saith: I don't know what Mrs. Griswold's maiden or other name was before she was married to John Griswold.

4th. To the fourth cross-interrogatory he saith: I don't know where she was born nor where she lived before her marriage
36 with John Griswold.

5th. To the fifth cross-interrogatory he saith: I have no photograph of Mrs. Griswold.

6th. To the 6th cross-interrogatory he saith: She is about five feet three or four inches in height, medium size, fair complexion, light hair, not very light when I knew her the first time, hazel eyes; no peculiarity, except rather a prominent nose.

7th. To the 7th cross-interrogatory he saith: When I first knew the father and mother of the plaintiffs, Charles was born, and I do not know whether Lillie was born then or not. I do not know what his age was then; I know he was a little boy.

8th. To the eighth cross-interrogatory he saith: John Griswold died at Eagle River, in Keweenaw county, Michigan, some time in the winter of 1860; I judge about December.

37 9th. To the 9th cross-interrogatory he saith: Mrs. Griswold, now Mrs. Carey, is still living; she is now living in Alloney township, Keweenaw county, Michigan.

10th. To the 10th cross-interrogatory he saith: I am no relation to the plaintiffs or to any of them. I was born in Ireland in 1828.

JEREMIAH CRONIN.

Examination taken reduced to writing and by the witness subscribed and sworn to this 18th day of December, 1882, before—

ALLEN F. REES,
Commissioner.

38 CHRISTOPHER CAREY, blacksmith, of Alloney, Keweenaw county, Michigan, aged fifty-two years and upwards, being duly sworn and examined on the part of the plaintiffs, doth depose and say as follows:

1st. To the first interrogatory he saith: My name is Christopher Carey; my age is 52 years last May; I reside in Alloney, Keweenaw county, Michigan.

2nd. To the second interrogatory he saith: I know all the plaintiffs in this suit.

3rd. To the third interrogatory he saith; I knew their father and mother. The father's name was John Griswold, and the mother's name was Julia Ann Griswold. The name of their mother before she was married, as she has told me, was Julia Ann Laurie. I do not know where they were married nor by whom.

4th. To the fourth interrogatory he saith: Their father is
39 dead and their mother is living and is married to Christopher Carey. John Griswold died in December about the 10th, 1860, at Eagle River, in Houghton county then, now Keweenaw, State of Michigan.

5th. To the fifth interrogatory he saith: They had three children that I know. Their names are Charles Griswold, Lillie Ann Griswold, and John C. Griswold. The youngest was twenty-one years of age the 7th of last January, 1882.

6th. To the sixth interrogatory he saith: Charles lives in Cleveland, Ohio; Lillie Ann, in Florence, Wisconsin, and John C., at Alloney, Michigan.

7th. To the 7th interrogatory he saith: I do not know of any relationship between the father of plaintiffs and Paul D. Geisse, except by hearsay.

8th. To the 8th interrogatory he saith: I do not know where he lived in 1846, 1847, 1848, & 1849, nor in what business he was engaged nor with whom.

40 9th. To the ninth interrogatory he saith: From 1849 or 1850 he lived at Eagle Harbor and Eagle River, Keweenaw county, Michigan, until the time of his death.

1st. To the first cross-interrogatory he saith: I first made the acquaintance of John Griswold and his wife at Eagle Harbor, in the Government light-house there, in 1854; I knew John Griswold before that.

2nd. To the second cross-interrogatory he saith: John Griswold and his wife lived in Eagle Harbor township, in Houghton county, now Keweenaw county, State of Michigan; I do not know where they lived before they came to Eagle Harbor.

3rd. To the third cross-interrogatory he saith: Mrs. Griswold has told me that her name was Julia Ann Laurie before her marriage to John Griswold.

41 4th. To the fourth cross-interrogatory he saith: She told me she was born in Detroit, Wayne county, Michigan, from French parents, and that she lived there before her marriage with John Griswold.

5th. To the fifth cross-interrogatory he saith: I have no photograph of Mrs. Griswold, the mother of plaintiffs.

6th. To the sixth cross-interrogatory he saith: She is a woman of medium size—height, five feet three to five feet four; light complexion; rather light hair; hazel-color- eyes; thin face, and longish nose.

7th. To the seventh cross-interrogatory he saith: When I first knew John Griswold and wife there was one of the plaintiffs born that I knew of; that was Charles Griswold; I couldn't tell what his age was at that time; he was a little fellow. When they
42 moved from Eagle Harbor to Eagle River, in the fall of 1858, they brought two children with them, Charles and Lillie Ann.

8th. To the eighth cross-interrogatory he saith: John Griswold died at Eagle River, in Houghton county, now in Keweenaw county, State of Michigan, on or about the 10th day of December, 1860, and John C. Griswold was born four weeks after his father died.

9th. To the 9th cross-interrogatory he saith: Mrs. Griswold was married to me, and is now living at the Alloney —, Keweenaw county, Michigan. I was married to Julia C. Griswold, the mother of the plaintiffs, in July, 1865.

10th. To the 10th cross-interrogatory he saith: I am no blood relation to any of the plaintiffs. I am married to their
43 mother. I am their step-father. I was born in Ireland in 1830, the 17th of May.

CHRISTOPHER CAREY.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 18th day of December, 1882, before—

ALLEN F. REES,
Commissioner.

44 JOHN SENTER, capitalist, of Eagle River, Keweenaw county, Michigan, aged fifty-nine years and upwards, being duly sworn and examined on the part of the plaintiffs, doth depose and say as follows:

1st. To the first interrogatory he saith: My name is John Senter; my age is fifty-nine years; I reside at Eagle River, Keweenaw county, Michigan.

2nd. To the second interrogatory he saith: I know the plaintiffs in this suit.

3rd. To the third interrogatory he saith: I knew their father and mother. The father's name was John Griswold; seems to me that the mother's name was Julia; I am not sure about the mother's name; I do not know what her name was before she was married, nor where they were married, nor by whom.

4th. To the fourth interrogatory he saith: The father is dead and the mother is living; the father died at Eagle River, Ke-
45 weenaw Co., Michigan, on the 10th day of December, 1860.

5th. To the fifth interrogatory he saith: I know of but three children of theirs; their names are Charles, Lillie, and John. I don't know the ages of any of the children, and do not know when the youngest arrived at the age of twenty-one years.

6th. To the sixth interrogatory he saith: They all resided at Eagle River for awhile; Charles Griswold was a few years ago living in Cleveland; John is at the Alloney —, in Keweenaw county, Michigan; I don't know where Lillie resides.

7th. To the seventh interrogatory he saith: I know of no relationship between the father of plaintiffs and Paul D. Geisse.

8th. To the eighth interrogatory he saith: I do not know where the father of plaintiffs resided in 1846, 1847, '48, & '49; I knew him a long time ago at S. P. Brady's, in Detroit, but I couldn't
46 give the year. I do not know in what business he was engaged at that time nor with whom.

9th. To the ninth interrogatory he saith: I knew him first at Detroit and subsequently at Eagle Harbor and Eagle River; but I do not know when he came here; he lived at those places until his death.

1st. To the first cross-interrogatory he saith: I made John Griswold's acquaintance at Detroit, and of his wife at Eagle Harbor; I can't tell the date.

2nd. To the second cross-interrogatory he saith: When I first made Griswold's acquaintance he lived in Detroit, Wayne county, Michigan; they lived in Detroit before they came up here. I don't know where she lived, for I didn't know her before they came to Eagle Harbor.

3rd. To the third cross-interrogatory he saith: I do not
47 know what Mrs. Griswold's maiden or other name was before she was married to John Griswold.

4th. To the fourth cross-interrogatory he saith: I do not know where she lived prior to her marriage.

5th. To the fifth cross-interrogatory he saith: I have no photograph of Mrs. Griswold, and could not procure one.

6th. To the sixth cross-interrogatory he saith: She had light hair, fair complexion, and, I should say, dark eyes; she was about five feet four or five inches in height, medium size; no peculiarity that I remember.

7th. To the seventh cross-interrogatory he saith: I don't know whether any of the plaintiffs were born or not when I first knew John Griswold & wife.

48 8th. To the eighth cross-interrogatory he saith: John Griswold died at Eagle River, Keweenaw county, Michigan, December 10th, 1860.

9th. To the ninth cross-interrogatory he saith: Mrs. Griswold, the mother of plaintiffs, is still living in Alloney township, Keweenaw county, Michigan.

10th. To the tenth cross-interrogatory he saith: I am no relation to any of the plaintiffs; I was born at Peterborough, New Hampshire, Dec. 15th, 1823.

JNO. SENTER.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 18th day of December, 1882, before—

ALLEN F. REESE,
Commissioner.

49 MARK MATTHEWS, no occupation, aged sixty-eight years and upwards, being duly sworn and examined on the part of the plaintiffs, doth depose and say as follows:

1st. To the first interrogatory he saith: My name is Mark Matthews; my age is sixty-eight [years], and I reside in Houghton, Houghton Co., Michigan.

2nd. To the second interrogatory he saith: I know the plaintiffs in this suit.

3rd. To the third interrogatory he saith: I knew their father and mother very well; the father's name was John Griswold. I couldn't say what Mrs. Griswold's Christian name is; I do not know the mother's name before she was married, nor where they were married, nor by whom.

4th. To the fourth interrogatory he saith: John Griswold is dead; Mrs. Griswold is still living. John Griswold died at Eagle River; I do not remember exactly the year that he died in.

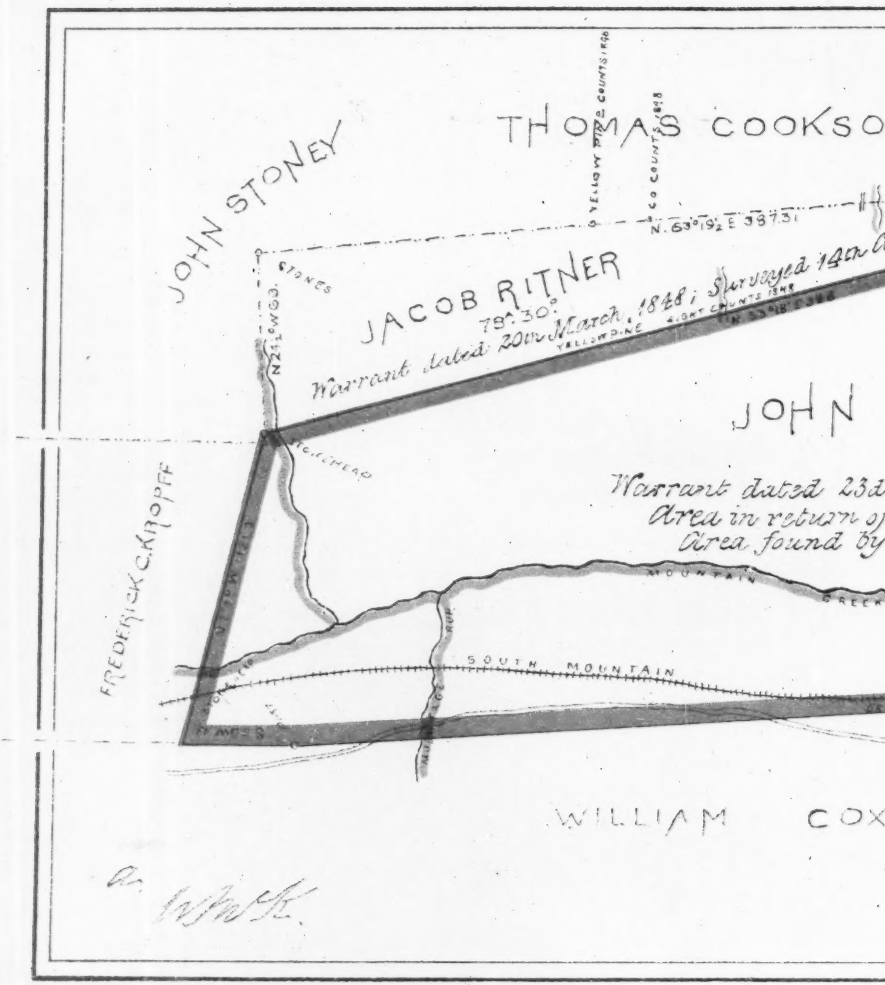
50 5th. To the fifth interrogatory he saith: I believe there was four children; I couldn't say their names; I don't remember them exactly; Charles was the oldest. I couldn't say when the youngest was twenty-one years of age.

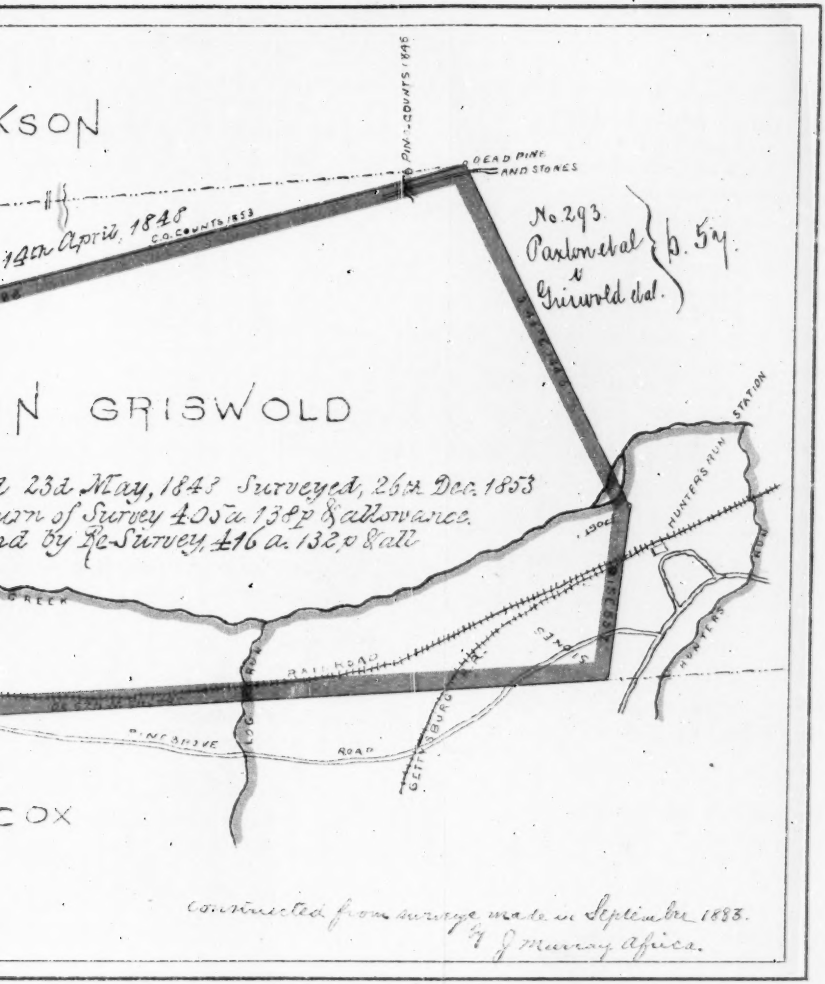
6th. To the sixth interrogatory he saith: I do not know where the children reside now.

7th. To the seventh interrogatory he saith: I know of no relationship between the father of plaintiffs and Paul D. Geisse.

8th. To the eighth interrogatory he saith: I do not know where the father of plaintiffs lived in the years 1846, 1847, 1848, & 1849, nor in what business he was engaged nor with whom.

9th. To the ninth interrogatory he saith: The father of plaintiffs lived from that time, about 1850, in Eagle Harbor, and moved from there to Eagle River, where he lived until his death.


JOHN STONEY
THOMAS COOKSO
JACOB RITNER
Warrant dated 20th March 1848; Surveyed 14th
JOHN
Warrant dated 23d
Area in return
Area found by
FREDERICK CHTOPFF
SOUTH MOUNTAIN
WILLIAM COX



Constructed from survey made in September 1883.
by J Murray Africa.

51 1st. To the first cross-interrogatory he saith: I first made the acquaintance of John Griswold and his wife at Eagle Harbor about 1850 or 1851. She wasn't there as soon as that; she came here soon after he did.

2nd. To the second cross-interrogatory he saith: When I first made their acquaintance they lived in the township of Eagle Harbor, county of Houghton it was then, now in the county of Keweenaw, in the State of Michigan. I couldn't say where they lived before they moved up here.

3rd. To the third cross-interrogatory he saith: I do not know Mrs. Griswold's maiden or other name was before her marriage with John Griswold.

4th. To the fourth cross-interrogatory he saith: I couldn't
52 say where Mrs. Griswold was born nor where she lived prior to her marriage to John Griswold.

5th. To the fifth cross-interrogatory he saith: I have no photograph of Mrs. Griswold, and could not procure one.

6th. To the sixth cross-interrogatory he saith: She has dark eyes; darkish hair; she is a shortish woman; she was middling stout when I first knew her; darkish complexion; no peculiarity that I remember.

7th. To the seventh cross-interrogatory he saith: When I first knew John Griswold and his wife they had one child, and that was the boy Charles. I should think he was a boy seven or eight years of age when I first knew him.

8th. To the eighth cross-interrogatory he saith: John Griswold died at Eagle River, Keweenaw county, Michigan; I couldn't
53 say when it was.

9th. To the ninth cross-interrogatory he saith: Mrs. Griswold, the mother of the plaintiffs, is still living. I believe they are now living at the Alloney —, Keweenaw county, Michigan.

10th. To the tenth cross-interrogatory he saith: I am no relation to any of the plaintiffs. I was born in England, county of Cornwall, parish of Kenwade, in August, 1814.

MARK MATTHEWS.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 18th day of December, 1882, before—

ALLEN F. REES,
Commissioner.

54 (Endorsed:) No. 44. April sess., 1882. C. C. U. S., E. D. of Pa. Griswold *et al. vs.* Paxton *et al.* Commission to Houghton, Mich. Returned — opened in open court & filed January 5, 1883.

55 And thereupon it is ordered that a jury come to try the issue joined in this case.

And afterwards, to wit, on the 8th day of April, A. D. 1884, came the parties aforesaid, and the jurors of the jury aforesaid being called likewise came, to wit, 1, S. Harvey Thomas; 2. Thomas B. Jones; 3,

Charles Terry; 4, Charles Walton; 5, Philip H. Horn; 6, David Pepper; 7, Richard M. Greiner; 8, Jacob Parton; 9, John A. Brown, Jr.; 10, William P. Conover, Jr.; 11, Edward Brown; 12, George Henry Heinly, who are duly empanelled, returned, chosen, tried, and sworn or affirmed to speak the truth, &c., in the issue joined in this case.

56 And afterwards, to wit, on the 9th day of April, A. D. 1884, the jury are directed to find a verdict in favor of the plaintiffs and against the defendants for the following-described tract of land, to wit: Beginning at a post and stone heap on a line of land in the warrantee name of William Cox, and also the southeast corner of a tract in the warrantee name of Frederick C. Kropff, thence by land of the said Frederick C. Kropff north seven degrees and forty-eight minutes west one hundred and twenty one and seven-tenths perches to a stone heap, being the southwest corner of the survey in name of Jacob Ritner; thence by said Jacob Ritner's survey north fifty-three degress and nineteen minutes east three hundred and ninety-six perches to a dead pine and stones; thence south forty-eight degrees east one hundred and forty-four and five-tenths perches to a post; thence south fifteen degrees east sixty-five and seven-tenths perches to stones in line of William Cox survey; thence by said William Cox — south sixty-four degrees and forty-five minutes west four hundred and twenty-five and eighty-nine hundredths perches to a post; thence south sixty-nine degrees west forty-three perches to the place of beginning, containing four hundred and sixteen acres and one hundred and thirty-two perches and allowance, according to a draft of a survey hereto attached and marked "A," W. McK, as made by J. Murray Africa, with costs.

(Here follows diagram marked p. 57.)

58 Whereupon the jurors aforesaid, upon their oaths or affirmations aforesaid, respectively, do say that they find for the plaintiffs and against the defendants.

And afterwards, to wit, on the 12th day of April, A. D. 1884, the defendants, by their attorneys, came into our said court here and move the court for a new trial, and file the following reasons therefor, to wit:

59 Circuit Court of the U. S., Eastern District of Pa. April Session, 1882.

GRISWOLD *et al.*
vs.
PAXSON, LEHMAN, *et al.* } No. 44.

And now this 12th day of April, A. D. 1884, the defendants, through their counsel, S. Hepburn, Jr., and William F. Sadler, Esqs., move the court to grant a new trial in the above case, and assign as reasons therefor the following:

1. Because the learned judge who tried the case refused defendants' offer of evidence as follows:

"To prove that a survey was actually made immediately after the date of the warrant (to Thomas Cookson) and 1,264 acres located upon it.

That this location and survey was known to the proprietaries and recognized and approved by their officers.

That a subsequent warrant was issued by the proprietaries calling for this location in favor of Cookson.

60 That this land was assessed for taxes in 1765, in 1770, and subsequently."

2. Because the learned judge refused defendants' further offer of evidence as follows:

"That the same land was conveyed by different deeds and by various legal proceedings down to the year 1846, when it vested in Geisse and Kropff, who mortgaged it to The Farmers' and Mechanics' Bank of Philadelphia to secure part of the purchase-money.

That the land was sold on the mortgage on 13th November, 1849, purchased by the said bank, and by them conveyed to the defendants and those under whom they claim.

That Griswold, under whom plaintiffs claim, was a clerk in the employ of Geisse & Kropff, and made an application in 1848 for this land, and therein set out that it was for the use of Geisse & Kropff.

That Griswold left the State immediately after that date, 1848, and never returned, and the title by return of survey and by patent was completed by the defendants in the name of Griswold, because it was the custom of the land office at that day to issue the patent in the name of the applicant, Griswold having died in 1860."

61 3. Because the learned judge sustained the objections of the plaintiffs to the foregoing offers of evidence.

4. Because the learned judge directed the jury to find a verdict for the plaintiffs.

5. Because the verdict was against the law.

6. Because the verdict was against the evidence as offered.

S. HEPBURN, JR.,
W. F. SADLER,
Per J. R. S.,
Att'ys for Defendants.

61½ [Endorsed:] April sess., 1882. No. 44. Circuit Court of U. S., E. D. of Pa. Griswold *et al. vs.* Paxson, Lehman, *et al.* Motion for new trial & reasons. Filed April 12, 1884. S. Hepburn, Jr., W. F. Sadler.

62 And afterwards, to wit, on the 15th day of April, A. D. 1884, this cause came on to be — on motion for a new trial, and having been argued by counsel for the respective parties the court overrule the motion for a new trial and order-judgment to be entered on the verdict in favor of plaintiffs and against the defendants.

Whereupon judgment is accordingly entered.

63 *Bill of Exceptions.*

Be it remembered that in the session of April, No. 44, A. D. 1882, came Charles Griswold, a citizen of the State of Ohio, Lillie Ann Griswold, a citizen of the State of Wisconsin, and John C. Griswold, a citizen of the State of Michigan, children and heirs-at-law of John Griswold, deceased, into the circuit court of the United States for the eastern district of Pennsylvania, at Philadelphia, Pa., and impleaded George W. Paxton, Jacob C. Lehman, James A. Walter, Eugene A. Grove, Jacob E. Barnitz, Elias Fisher, and Thomas Creary, citizens of the State of Pennsylvania, in a certain plea of ejectment, &c., in which the said plaintiffs declared (*prout* writ) and the said defendants pleaded (*prout* pleas), and thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at the city aforesaid, before the honorable William McKennan, circuit judge of the said court, Tuesday & Wednesday, the 8th & 9th days of April, A. D. 1884, the aforesaid issue between the said parties came to be tried by a jury of the said court & circuit for that purpose duly impannelled (*prout* list of jurors), at which day came as well the said plaintiff as the said defendant, by their respective attorneys, and the jurors of the jury aforesaid impannelled to try the said issues being also called, came, and were then and there in due manner chosen and sworn or affirmed to try the said issue, and upon the trial the counsel of the said plaintiffs to maintain the said issue on their part —.

64 The plaintiffs made the following offers in evidence:

Warrant granted to John Griswold, dated May 23rd, 1848, for four hundred acres of land on Mountain creek (*prout* same).

Survey made on above warrant, dated December 26th, 1853, containing 405 acres and 138 perches, returned into the land office (*prout* same).

Patent to John Griswold for the above land, dated 17th October, 1865 (*prout* same).

Writ of ejectment issued in this case (*proue* same).

The defendants objected to the offer of the writ of ejectment as the description does not conform to the papers.

The court admitted the evidence offered merely for the purpose of showing *prima facie* that the defendants are in possession of the land claimed in the writ.

The plaintiffs further offered in evidence certain depositions which were not read but which were admitted by both parties to show that the plaintiffs were the children and heirs-at-law of John Griswold (*prout* same).

Plaintiffs closed.

65 The defendants opened and made the following offer:

A. Warrant to Thomas Cookson, dated 26th August, 1751.

B. Certificate of payment of purchase-money by Cookson on 27th August, 1751—

To prove that a survey was actually made immediately after the date of the warrant and 1,264 acres located upon it.

That this location and survey was known to the proprietaries and recognized and approved by their officers.

That a subsequent warrant was issued by the proprietaries calling for this location in favor of Cookson.

That this land was assessed for taxes in 1765, in 1770, and subsequently.

That the same land was conveyed by different deeds and by various legal proceedings down to the year 1846, when it vested in Geisse and Kropff, who mortgaged it to the Farmers' and Mechanics' Bank of Philadelphia, to secure part of the purchase-money.

That the land was sold on the mortgage on 13th November, 1849, purchased by the said bank, and by them conveyed to the defendants and those under whom they claim.

That Griswold, under whom plaintiffs claim, was a clerk in the employ of Geisse and Kropff, and made an application in 1848 for this land and therein set out that it was for the use of Geisse and Kropff.

66 That Griswold left the State immediately after that date, 1848, and never returned, and the title by return of survey and by patent was completed by the defendants in the name of Griswold, because it was the custom of the land officer at that day to issue the patent in the name of the applicant, Griswold having died in 1860.

Objected to by the plaintiffs. No survey was ever made upon it by any proof that is adduced before this court in any shape or form by any official.

The plaintiffs further object for the reason that the offer does not propose to show an official survey, or survey made by direction of the proprietaries; that any other survey is immaterial and irrelevant in this case; finding lines of an old survey upon the ground does not prove that they are made by official authority or that they were any more than trespasses upon the land of the proprietaries; that such a survey unreturned gives no right to a warrantee under the proprietaries claiming land by virtue of a warrant issued under the proprietary system; that under the act of 1784 no more than four hundred acres could be surveyed upon one warrant, and that a survey made prior to the act of 1779 never returned into the

67 land department. Conceding that they had the right to perfect their title under the act of Assembly, they could not have surveyed or patented under that survey more than 400 acres.

Further, that the defendants cannot set up an equitable title in this action.

The COURT: "A and B" admitted; rest of "offer rejected."

Exception for defendants for rejection of the rest of their offer.

Defendants then put in evidence—

Warrant to Thomas Cookson for 150 acres of land on branch of Yellow-Breeches creek, dated August 26th, 1751. (*Prout* same.)

Certificate for payment of purchase money by Thomas Cookson on said warrant to the land office, August 26th, 1751. (*Prout* same.)

Defendants close.

The COURT: Gentlemen of the jury, under the evidence in this case and the ruling of the court upon the offers of evidence made by the defendants, the plaintiff is entitled to recover about 416 acres of land embraced in the warrant, survey, and patent given in evidence in their behalf, and your verdict, therefore, will be for the land as described particularly in the verdict which you are directed to render in favor of the plaintiffs.

The jury are directed to find a verdict in favor of the plain-
68 tiffs and against the defendants for the following tract of land, to wit:

Beginning at a post and stone heap on a line of land in the warrantee named of William Cox; and also the southeast corner of a tract in the warrantee named [of] Frederick C. Kropff, then by the land of the said Frederick C. Kropff north seven degrees and forty-eight minutes west 121 acres and seven-tenths perches to a stone heap, being the southwest corner of the survey in the name of Jacob Rittner; thence besides Jacob Rittner's survey north fifty-three degrees and nineteen minutes east 396 perches to a dead pine and stones; thence south forty-eight degrees east 144 and five-tenths perches to a post; thence south fifteen degrees east sixty-five and seven-tenths perches in line of William Cox survey; thence by said William Cox south sixty-four degrees and forty-five minutes west 425 and eighty-nine one-hundredths perches to a post; thence south sixty-nine degrees west forty-three perches to the place of beginning, containing four hundred and sixteen acres and one hundred and thirty-two perches and allowance, according to a draft survey hereto attached and marked "A, W. McK.," as made by J. Murray Africa, with costs.

Exception for defendants.

Verdict accordingly.

69 (*Griswold Warrant and Survey.*)

Warrant form No. 23.

THE COMMONWEALTH OF PENNSYLVANIA, *ss:*

Whereas John Griswold, of the township of South Middleton, county of Cumberland, hath applied for four hundred acres of land (unimproved) adjoining lands surveyed in the name of Lewis Foulke, in the name of John Stong, and lands for which a warrant is applied for this day in the name of Fred'k C. Kropff, situate in the township of Dickinson and South Middleton, in the county of Cumberland, for which he has paid into the office of the state treasurer at the rate of ten pounds per hundred acres—interest thereon to commence from the date hereof, to be paid agreeably to the several acts of Assembly in such case made and provided—

These are therefore to authorize and require you to survey unto the said John Griswold the quantity of acres by him applied for at the place aforesaid if not already surveyed or appropriated, and to make return thereof into the surveyor general's office, for which this shall be your warrant.

In witness whereof John Laporte, the surveyor general, hath hereunto set his hand and affixed the seal of said office the twenty-third day of May, A. D. 1848.

[SEAL.] JOHN LAPORTE,
Surveyor General.

To Patrick Davidson, Esq., surveyor for Cumberland county.

70 In testimony that the above is a copy of the original remaining on file in the department of internal affairs of Pennsylvania I have hereunto set my hand and caused the seal of said department to be affixed, at Harrisburg, the 30th day of March, A. D. 1883.

AARON K. DUNKEL,
Secretary of Internal Affairs.

71 Draft of a tract of land on Mountain creek, lying partly in Dickinson and partly in South Middleton townships, Cumberland county, Pa., containing four hundred and five acres and one hundred and thirty-eight perches and allowance, surveyed December 26th, 1853, in pursuance of a warrant for 400 as granted to John Griswold, dated the 23rd day of May, 1848, surveyed p'r Jacob Ritner.

The above draught examined and approved May 22nd, 1855.

AB'M LAMBERTON,
County Surveyor.

In testimony that the above is a copy of the original remaining on file in the department of internal affairs of Pennsylvania I have hereunto set my hand and caused the seal of said department to be affixed, at Harrisburg, the twenty-eighth day of March, 1883.

[SEAL.] AARON A. DUNKEL,
Secretary of Internal Affairs.

72 *Patent Form No. 58.*

The Commonwealth of Pennsylvania, [by] A. G. Curtin, to all to whom these presents shall come sends greeting:

Know ye that, in consideration of the monies paid by John Griswold at the granting of the warrant hereinafter mentioned and of the sum of two dollars and thirty cents in full now paid by him into the treasury office of this Commonwealth, there is granted by the said Commonwealth unto the said John Griswold a certain tract of land, situate in Dickinson and South Middleton townships, Cumberland county, beginning at a post; thence by land of Frederick C. Keopff north nine degrees west one hundred and eighteen perches to stones; thence by land of J. Ritner north fifty-two degrees east three hundred and ninety perches to a small pine; thence by other land south forty-nine degrees east one hundred [and] forty-four and five-tenths perches to a small white oak; thence by land war-
73 ranted to Wm. Cox, returned to J. Miller, south sixteen

degrees east sixty-five perches to a post, late a pine; [thence] south sixty-four degrees west four hundred and sixty-two perches to the beginning, containing four hundred and five acres one hundred [and] thirty-eight perches and the allowance.

Which said tract was surveyed in pursuance of a warrant dated the twenty-third day of May, 1848, granted to the said John Griswold; to have and to hold the said tract or parcel of land, with the appurtenances, unto the said John Griswold and his heirs, to the use of him, the said John Griswold, his heirs and assigns, forever, free and clear of all restrictions and reservations as to mines, royalties, quit-rents, or otherwise, excepting and reserving only the fifth part of all gold and silver ore for the use of the Commonwealth, to be delivered at the pit's mouth clear of all charges.

In witness whereof Andrew G. Curtin, Governor of the said Commonwealth, hath hereunto set his hand and the seal of the
74 office of the surveyor general of Pennsylvania hath been hereunto affixed the seventeenth day of October, in the year of our Lord one thousand eight hundred and sixty-five, and of the Commonwealth the ninetieth.

Attest: JAMES P. BARR,
Surveyor General.

Enrolled in patent book H, vol. 58, page 527.

I do hereby certify that the within is a true copy of a patent as recorded in patent book H, volume 58, page 527, now remaining in the department of internal affairs of Pennsylvania.

In testimony whereof I have hereunto set my hand and caused the seal of said department to be affixed, at Harrisburg, the fifth day of June, A. D. 1884.

[SEAL.] J. SIMPSON AFRICA,
Secretary of Internal Affairs.

75 A.

(*Cookson Warrant.*)

Warrant form No. 3.

By the propriataries.

PENNSYLVANIA, *ss:*

Whereas Thomas Cookson, of the county of Cumberland, hath requested that we would grant him to take up one hundred and fifty acres of land on a branch of Yellow Breeches, in the said county of Cumberland, for which he agrees to pay to our use at the rate of fifteen pounds ten shillings, current money of this province, for one hundred acres, and the yearly quit-rent of one-half penny sterling for every acre thereof:

These are, therefore, to authorize and require you to survey, or caused to be surveyed, unto the said Thomas Cookson at the place aforesaid, according to the method of townships appointed, the said quantity of 150 acres, if not already surveyed or appropriated, and

make return thereof into the secretary's office in order for
76 further confirmation, for which this shall be your sufficient warrant. Which survey in case the said Thomas Cookson fulfil the above agreement within six months from the date hereof shall be valid; otherwise void.

Given under my hand and the seal of the land office, by virtue of certain powers from the said proprietaries, at Philadelphia, this twenty-sixth day of August, anno Domini one thousand seven hundred and fifty-one.

JAMES HAMILTON. [SEAL.]

To Nicholas Scull, surveyor general.

In testimony that the above is a copy of the original remaining on file in the department of internal affairs of Pennsylvania, I have hereunto set my hand and caused the seal of said department to be affixed, at Harrisburg, this 30th day of March, A. D. 1883.

[SEAL.] AARON K. DUNKEL,
Secretary of Internal Affairs.

77 B.

(*Extract from Ledger of Dep't Internal Affairs Showing Payment on Cookson Warrant.*)

Among the records and proceedings of the department of internal affairs of Pennsylvania *inter alias* it is thus contained:

Extract from ledger.

* * * * * * *

Thomas Cookson, Dr.

1751.
Aug. 27. 44. To land (2 W. S.) on Yellow Breeches creek - 43
1874.
Aug. 21st. 216 a's 31 p's pat. to the Mt. Holly Paper Co., at vo. - 86119

Contra Cumberland, Cr.

1751.
Aug. 27. 44. By cash ten pounds & £7 10 ---------- 54 £17 10

In testimony that the above is a correct extract from ledger "F," page 65, remaining in the department of internal affairs of Pennsylvania, I have hereunto set my hand and caused the seal of the said department to be affixed, at Harrisburg, this 30th day of March, A. D. 1883.

AARON K. DUNKEL,
Sec'y of Internal Affairs.

78 And thereupon the counsel for the said defendants did then and there except to the aforesaid charge and opinion of the said court, and inasmuch as the said charge and opinion so excepted to do not appear upon the record—

The said counsel for the said defendants did then and there tender this bill of exceptions to the opinion of the said court and requested the seal of the judge aforesaid should be put to the same according to the form of the statute in such case made and provided; and thereupon the aforesaid judge, at the request of the said counsel for the defendants, did put his seal to this bill of exceptions pursuant to the aforesaid statute in such case made and provided this 25th day of April, A. D. 1884.

W. McKENNAN. [SEAL.]

79 (Endorsed:) No. 44. April sessions, 1882. In the circuit court of the United States, eastern dist. of Penna. Griswold *et al vs.* Paxton, Lehman, *et al.* Bill of exceptions. Presented April 19th, 1884. W. McK., cir. J. Filed April 25, 1884. S. Hepburn, Jr. W. F. Sadler.

80 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit. April Sess., 1882.

J. C. LEHMAN, E. A. GROVE, J. E. BARNITZ, GEO. W. PAXTON, and —— WALTERS, Pl'ff's in Error,
vs.
CHARLES GRISWOLD *et al.*
} No. 44.

Know all men by these presents that we, J. C. Lehman, and Charles H. Mullin, and Samuel Given, are held and firmly bound unto Charles Griswold, Lillie Ann Griswold, and John C. Griswold, the above-named def'ts in error, in the full and just sum of five thousand dollars, to be paid to the said Charles Griswold, Lillie Ann Griswold, and John C. Griswold, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 29th day of April, A. D. 1884.

Whereas lately at a term of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a suit depending in said court between Charles Griswold, Lillie Ann Griswold, and John C. Griswold, plaintiffs, and the said J. C. Lehman, E. A. Grove, J. E. Barnitz, Geo. W. Paxton, and James H. Walters, def'ts, judgment was rendered against the said defendants, and the said defendants below having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to

81 the said plaintiffs below citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next ensuing:

Now, the condition of the above obligation is such that if the said J. C. Lehman *et al.*, defendants below and plaintiffs in error, shall prosecute their writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

J. C. LEHMAN. [SEAL.]
CHAS. H. MULLIN. [SEAL.]
SAMUEL GIVEN. [SEAL.]

Sealed and delivered in presence of—
S. HEPBURN, JR.

Sureties approved.

WM. BUTLER, *Judge.*

[Endorsed:] No. 44. April sess., 1882. Circuit court United States. Griswold *et al. vs.* Paxton *et al.* Bond *sur* writ of error. Filed May 12, 1884.

82 UNITED STATES OF AMERICA, } *sct:*
Eastern District of Pennsylvania, }

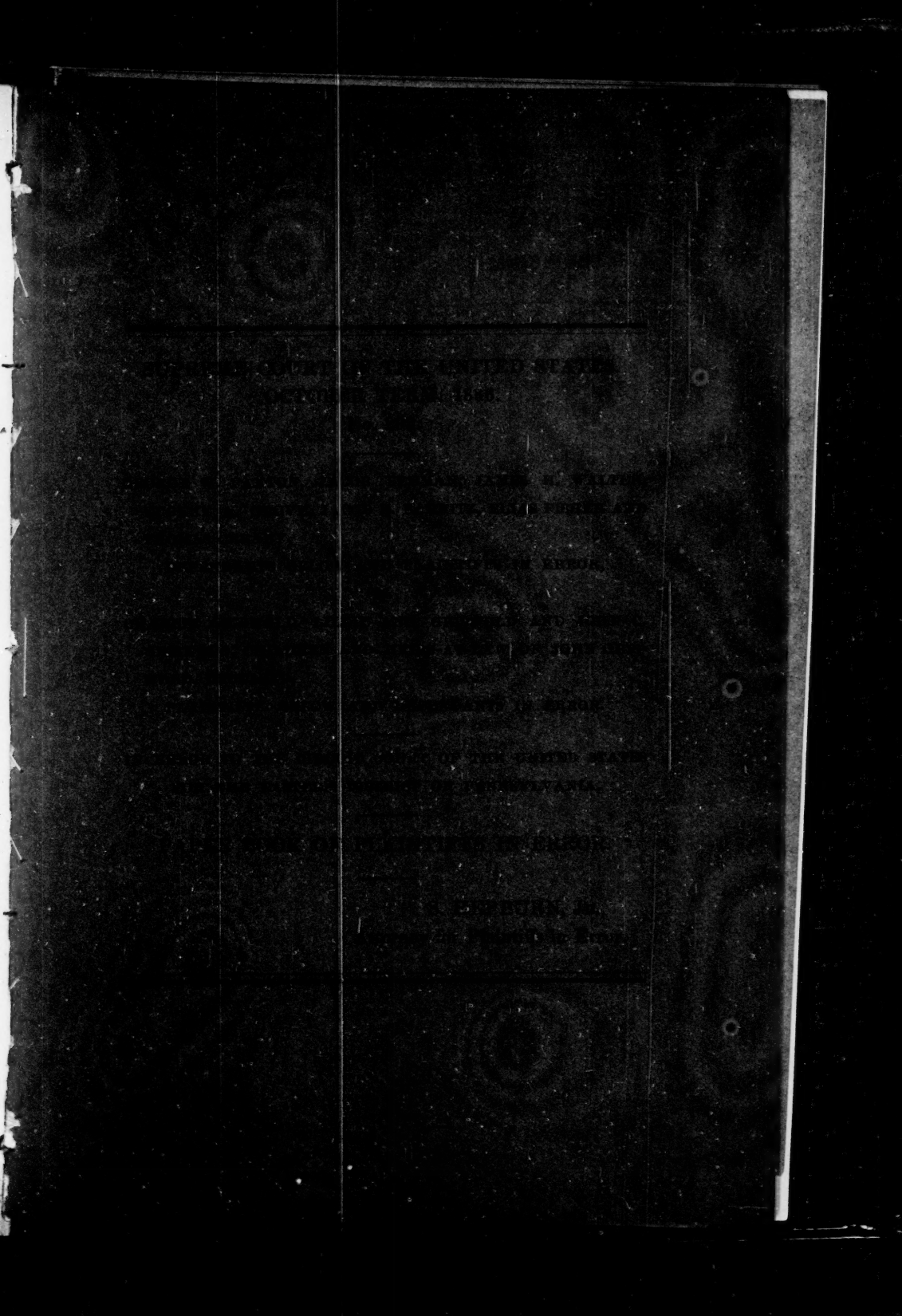
I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of Charles Griswold, Lillie Ann Griswold, and John C. Griswold, plaintiffs, and George W. Paxton, Jacob C. Lehman, James H. Walter, Eugene A. Grove, Jacob E. Barnitz, Elias Fisher, & Thomas Creary, defendants, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this twenty-eighth day of July, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of these United States the one hundred and ninth.

[Seal U. S. Circuit Court, E. D. Pennsylvania.]

SAMUEL BELL,
Clerk of C. C.

Endorsed on cover: E. Pennsylvania C. C. U. S. No. 293. George W. Paxton, Jacob C. Lehman, James H. Walter, Eugene A. Grove, Jacob E. Barnitz, Elias Fisher, & Thomas Creary, plaintiffs in error, *vs.* Charles Griswold, Lillie Ann Griswold, & John C. Griswold, children & heirs-at-law of John Griswold, deceased. Filed 12th September, 1884.



122-441

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 293.

GEORGE W. PAXTON, JACOB LEHMAN, JAMES H. WALTER, EUGENE A. GROVE, JACOB E. BARNITZ, ELIAS FISHER AND THOMAS CREARY,

DEFENDANTS BELOW AND PLAINTIFFS IN ERROR,

vs.

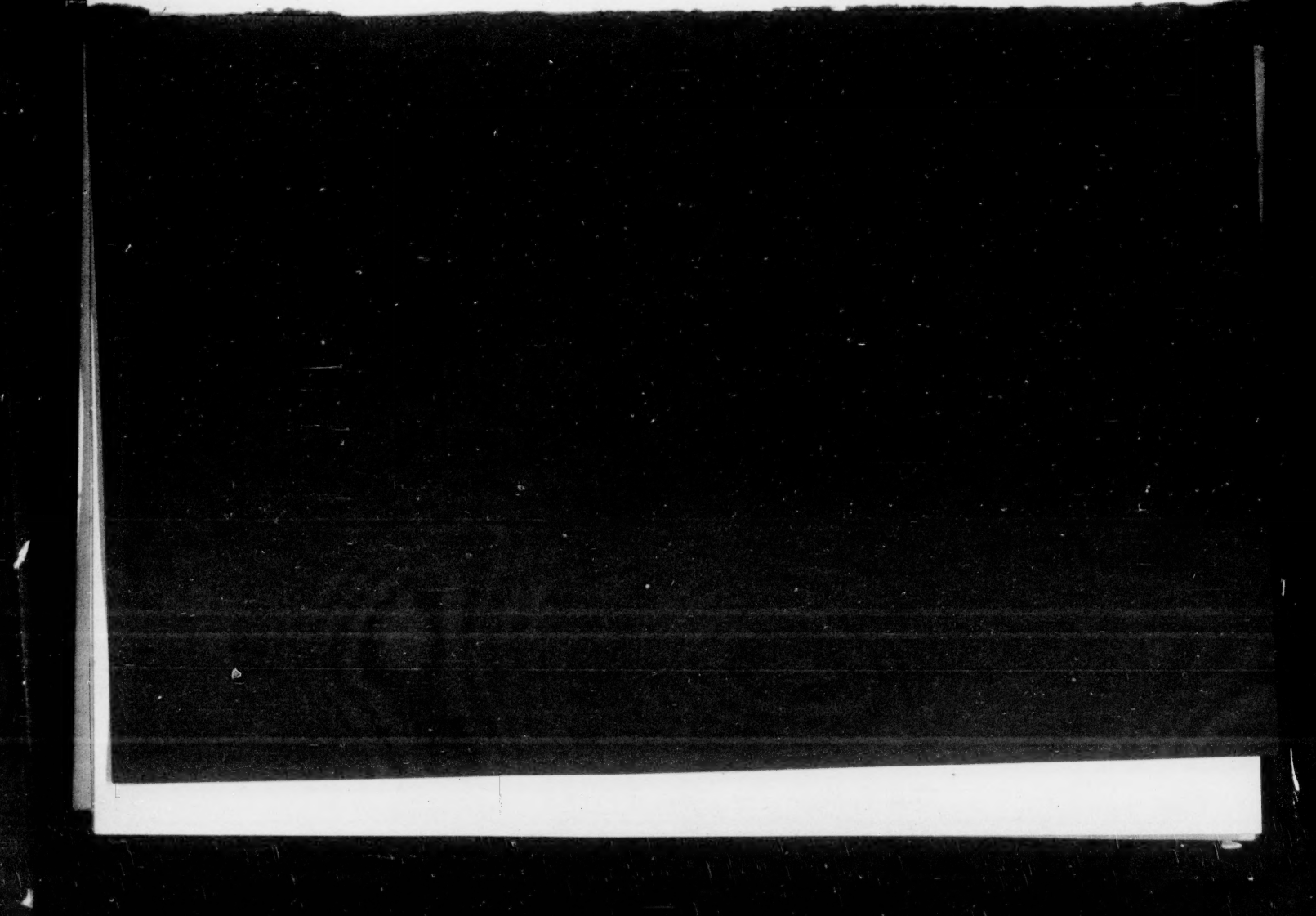
CHARLES GRISWOLD, LILLIE ANN GRISWOLD AND JOHN C. GRISWOLD, CHILDREN AND HEIRS-AT-LAW OF JOHN GRISWOLD, DECEASED,

PLAINTIFFS BELOW AND DEFENDANTS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

PAPER BOOK OF PLAINTIFFS IN ERROR.

S. HEPBURN, JR.,
Attorney for Plaintiffs in Error.



SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1886.
No. 293.

GEORGE W. PAXTON, JACOB LEHMAN, JAMES H. WALTER, EUGENE A. GROVE, JACOB E. BARNITZ, ELIAS FISHER AND THOMAS CREARY,

DEFENDANTS BELOW AND PLAINTIFFS IN ERROR,

vs.

CHARLES GRISWOLD, LILLIE ANN GRISWOLD AND JOHN C. GRISWOLD, CHILDREN AND HEIRS-AT-LAW OF JOHN GRISWOLD, DECEASED,

PLAINTIFFS BELOW AND DEFENDANTS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

STATEMENT OF THE CASE.

This is an action of ejectment brought to recover four hundred and five acres of land in Cumberland county, Penn'a—a great portion of it ore land.

The Plaintiffs below are the heirs at law of John Griswold, deceased.

In 1848 John Griswold was the clerk of a firm which did business as iron manufacturers and mined ore on a large body of (10,000 acres) land, of which the tract in dispute was a part, under the name of Geisse and Kropff.

Supposing the title to 1264 acres to be imperfect, this firm made several applications and took out warrants in several names, among them one by John Griswold, for the use of Geisse and Kropff.

After getting the warrant in the name of Griswold and before the survey and patent, Griswold left the employ of the company and went to Michigan. The first claim to the land made for him or by his legal representatives was in this action.

The title to the 1264 acre tract, of which this in dispute was a part, was, as we contend, good before the new applications, and it arose in this way:

In 1751 Thomas Cookson obtained from the proprietaries of Pennsylvania a warrant for 150 acres on Mountain Creek, Cumberland county. At that date there was no fixed limit to the number of acres that might be surveyed and taken up under a warrant. 1500 acres could be taken as easily as 150.

Cookson paid part of the purchase money, and surveyed 1264 acres; and marked the boundaries of the tract on the ground.

This tract was well known and recognized by the land office in different ways. It was called for and made the boundary of other surveys as early as 1769. It was assessed for taxes as early as 1765, and from that continuously, as a single tract of 1264 acres. It was conveyed by metes and bounds, by deeds, recorded as early as 1770–1771, and from that time on. It was mortgaged, taken in execution and sold by judicial sales; and finally by regular course of title, which appears of record, it was conveyed to the Farmers & Mechanics Bank of Philadelphia. This bank sold it to Geisse & Kropff, and Geisse & Kropff mortgaged it to the bank to secure a part of the purchase money. It was sold on this mortgage, purchased by the bank again, and by it sold to Samuel Given, who sold to the defendants.

Neither the title nor the possession was ever questioned until in this action.

The questions involved are these:

The plaintiffs below claim that the land was vacant when the

Griswold warrant was issued because the Cookson survey was never *returned* into the land office.

The Defendants below, Plaintiffs in error, contend that the land was *not* vacant; that a return of survey was not necessary before the Revolution; that a good title was obtained by a warrant, and an *actual survey*; that it was never known that a title was declared bad, or land declared vacant where an actual survey was made on the ground, and particularly where the survey was known to the land office, or where the land was assessed for taxes, that even the failure to pay the purchase money, or any part of it, did not affect the title, and that the offer of the Defendants below showed a perfect legal title on principles clearly settled by the decisions of our Supreme Court.

The rule on which the case was decided in the Circuit Court, viz.: That the survey *first returned* into the land office is the only valid one, and fixes the title; is one which has grown up since the Revolution. It was not in force under the Proprietaries, and so the Board of Property and the early courts of Pennsylvania have uniformly held.

These questions arose under an offer of evidence made by the Defendants in the Circuit court, objected to by the plaintiffs there and rejected by the court.

SPECIFICATIONS OF ERROR.

It is respectfully submitted that the learned Circuit Court erred as set forth in the following specifications:

1st. In rejecting this offer of the defendants below, viz:

The defendants opened and made the following offer:

A. Warrant to Thomas Cookson, dated 36th August, 1751.

B. Certificate of payment of purchase-money by Cookson on 27th August, 1751—

To prove that a survey was actually made immediately after the date of the warrant and 1264 acres located upon it.

That this location and survey was known to the proprietaries and recognized and approved by their officers.

That a subsequent warrant was issued by the proprietaries calling for this location in favor of Cookson.

That this land was assessed for taxes in 1765, in 1770, and subsequently.

That the same land was conveyed by different deeds and by various legal proceedings down to the year 1846, when it vested in Geisse & Kropff, who mortgaged it to the Farmers and Mechanics Bank, of Philadelphta, to secure part of the purchase-money.

That the land was sold on the mortgage on 13th November, 1849, purchased by the said bank, and by them conveyed to the defendants and those under whom they claim.

That Griswold, under whom plaintiffs claim, was a clerk in the employ of Geisse & Kropff, and made an application in 1848 for this land and therein set out that it was for the use of Geisse & Kropff.

That Griswold left the State immediately after that date, 1848, and never returned, and the title by return of survey and by patent was completed by the defendants in the name of Griswold, because it was the custom of the land officer at that day to issue the patent in the name of the applicant, Griswold having died in 1860.

Objected to by the plaintiffs. No survey was ever made upon it by any proof that is adduced before this court in any shape or form by any official.

The plaintiffs further object for the reason that the offer does propose to show an official survey, or survey made by direction of the proprietaries; that any other survey is immaterial and irrelevant in this case; finding lines of an old survey upon the ground does not prove that they are made by official authority or that they were any more than trespasses upon the land of the proprietaries; that such a survey unreturned gives no right to a warrantee under the proprie-

taries claiming land by virtue of a warrant issued under the proprietary system; that under the act of 1784 no more than four hundred acres could be surveyed upon one warrant, and that a survey made prior to the act of 1779 never returned into the land department. Conceding that they had the right to perfect their title under the act of Assembly, they could not have surveyed or patented under that survey more than four hundred acres.

Further, that the defendants cannot set up an equitable title in this action.

The Court: "A and B" admitted; rest of "offer rejected."

Exception for defendants for rejection of the rest of their offer.

2d. In directing the jury to render a verdict for plaintiffs as follows:

The Court: Gentlemen of the jury, under the evidence in this case and the ruling of the court upon the offers of evidence made by the defendants, the plaintiff is entitled to recover about 416 acres of land embraced in the warrant, survey and patent given in evidence in their behalf, and your verdict, therefore, will be for the land as described particularly in the verdict which you are directed to render in favor of the plaintiffs.

The jury are directed to find a verdict in favor of the plaintiffs and against the defendants for the following tract of land, to wit:

Beginning at a post and stone heap on a line of land in the warrantee named of William Cox, and also the southeast corner of a tract in the warrantee named [of] Frederick C. Kropff north seven degrees and forty-eight minutes west 121 acres and seven-tenths perches to a stone heap, being the southwest corner of the survey in the name of Jacob Rittner; thence beside Jacob Rittner's survey north fifty-three degrees and nineteen minutes east 396 perches to a dead pine and

stones: thence south forty-eight degrees east 144 and five-tenths perches to a post; thence south fifteen degrees east sixty-five and seven-tenths perches in line of William Cox survey; thence by said William Cox south sixty-four degrees and forty-five minutes west 425 and eighty-nine one-hundredths perches to a post; thence south sixty-nine degrees west forty-three perches to the place of beginning, containing four hundred and sixteen acres and one-hundred and thirty-two perches and allowance, according to a draft survey hereto attached and marked "A. W. McK," as made by J. Murray Africa, with costs.

Exception for defendants.

Verdict accordingly.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 393.

GEORGE W. PAXTON, JACOB C. LEHMAN, JAMES H. WALTER, EUGENE A. GROVE, JACOB E. BARNITZ, ELIAS FISHER, AND THOMAS CREARY,

DEFENDANTS BELOW AND PLAINTIFFS IN ERROR,

vs.

CHARLES GRISWOLD, LILLIE ANN GRISWOLD, AND JOHN C. GRISWOLD, CHILDREN AND HEIRS-AT-LAW OF JOHN GRISWOLD, DECEASED,

PLAINTIFFS BELOW AND DEFENDANTS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF OF ARGUMENT FOR PLAINTIFFS IN ERROR

This is an action of ejectment.

The Plaintiffs below, Defendants in error, claim the land occupied by the Defendants, and show as their title a *Warrant* dated May 23d, 1848—a *Survey*, embracing this land, dated Dec. 26th, 1853—and a *Patent* from the Commonwealth of Pennsylvania, dated Oct. 17th, 1865.

It is admitted, that, if the land was not appropriated, before the date of this warrant—May 23d, 1848—the Plaintiffs had a right to recover.

The Defendants below, Plaintiffs in error, claim that it was legally appropriated, nearly one hundred years before that date, by those from whom they derive title.

If so appropriated the Patent to Griswold is void. SERGEANT'S Land Law of Penn'a, 156.

The Plaintiffs below contend that the Defendants were bound to show by direct and positive evidence, and by the records of the land office, that a warrant was located and a survey made by a duly authorized officer of the Proprietaries of Pennsylvania--that this survey was *returned* into the land office before the survey on the Griswold warrant; and that it was for a quantity of land authorized by the act of 1784: that is, not more than 400 acres.

The Defendants below--Plaintiffs in error--insist that these rules do not apply to titles of the date of this one;

Because:

A *return* of survey of that date was not necessary:

If a survey was *actually made* and *known* to the officers, that was sufficient:

If a survey was called for by a subsequent warrant, that is proof that it was *known* and officially recognized and approved:

If land was assessed for taxes—that was a recognition of title.

The *amount* of *land* surveyed under a warrant did not affect the title. The land was subject to the payment of the purchase money. The *title* could only be reached by a *vacating warrant*, and later, by proceedings to recover the purchase money.

No warrant on which a survey was actually made was ever forfeited.

The title disclosed by the offer was an equitable title against the Proprietaries as early as 1765—was protected by the Divesting Act of 1779—and, since that, is a good legal title against the world.

The offer of Defendants rejected by the Court below, is: *Vide Transcript of Record*, pp. 21–23.

"The defendants opened and made the following offer:

"A. Warrant to Thomas Cookson, dated 26th August, 1751.

"B. Certificate of payment of purchase-money by Cookson on 27th August, 1751—

"To prove that a survey was actually made immediately after the date of the warrant and 1264 acres located upon it.

"That this location and survey was known to the proprietaries and recognized and approved by their officers.

"That a subsequent warrant was issued by the proprietaries calling for this location in favor of Cookson.

"That this land was assessed for taxes in 1765, in 1770, and subsequently.

"That the same land was conveyed by different deeds and by various legal proceedings down to the year 1846, when it vested in Geisse and Kropff, who mortgaged it to the Farmers' and Mechanics' bank of Philadelphia, to secure part of the purchase money.

"That the land was sold on the mortgage on 13th November, 1849, purchased by the said bank, and by them conveyed to the defendants and those under whom they claim.

"That Griswold, under whom plaintiffs claim, was a clerk in the employ of Geisse and Kropff, and made an application in 1848 for this land and therein set out that it was for the use of Geisse and Kropff.

"That Griswold left the state immediately after that date, 1848, and never returned, and the title by return of survey and by patent, was completed by the defendants in the name of Griswold, because it was the custom of the land officer at that day to issue the patent in the name of the applicant, Griswold having died in 1860.

"Objected to by the plaintiffs. No survey was ever made upon it by any proof that is adduced before this court in any shape or form by any official.

"The plaintiffs further object for the reason that the offer does not propose to show an official survey, or survey made by direction of the proprietaries; that any other survey is immaterial and irrelevant in this case; finding lines of an old survey upon the ground does not prove that they are made by official authority or that they were any more than trespasses upon the land of the proprietaries; that such a survey unreturned gives no right to a warrentee under the proprietaries claiming land by virtue of a warrant issued under the proprietary system; that under the act of 1784 no more than four hundred acres could be surveyed upon one warrant, and that a survey made prior to the act of 1779 never returned into the land department. Conceding that they had the right to perfect their title under the act of assembly, they could not have surveyed or patented under that survey more than 400 acres.

"Further, that the defendants cannot set up an equitable title in this action."

To determine the questions raised by the facts offered, it is necessary to inquire how rights to land were acquired against the Proprietaries of Pennsylvania before the 4th of July, 1776; for all these rights were preserved by the Divesting Act of 1779, the 7th Section of which reads:

"*All* and *every*, the *rights, titles, estates, claims* and *demands*, which were *granted by* or *drived from*, the said Proprietaries, *their officers*, or *others*, by them duly commissioned, authorized and appointed, or otherwise; *or* to which any person or persons, other than the said Proprietaries, *were*, or *are* entitled, either *in law or equity*, by virtue of any deed, patent, *warrant*, or survey, * * * shall be and the same are hereby confirmed, ratified and established forever," &c.

Dates, too, become very important; for there were many things required, and many things prohibited after 1765, which, prior to that date, were not considered important, or Immaterial.

Mr. SERGEANT, p. 55, says: "A deliberate change in the

mode of proceeding in the granting of lands took place in the year 1765, when a new system was introduced, called the *application system*, together with a more perfect regulation of the former modes of surveying lands. The measures then adopted render that year an epoch in the history of our land titles, the influence of which has been felt in succeeding periods."

The land office was opened in 1769. Before 1765 there was no regular system.

A history of the manner in which the "imperfect rights by warrant and survey without patent," and by settlement; and by other means, is given in the note of Judge SMITH, in Vol. 2 of the Laws of Penn'a.—"Of the Ancient Practice and Customs of the Land office previous to 1765"—page 137, *et. seq.* On page 147 he says: "It would be very material to ascertain the exact state of the Land office at every period of the provincial government; but from what has been shown, it must be seen that it is impracticable to delineate any regular system. *None such existed.* A knowledge of the customs and usages must therefore be derived from instances and facts scattered through its records. * * * The proprietors appear to have recognized the acts of their officers and agents, *however irregular*, with respect to the lands within the purchases. *The acts, practices* and *customs* grew *into rights*, and have been considered as contracts, which the law would have enforced against the proprietor; and *they have succeeded in Courts against younger rights, &c.*"

Again, page 154: "In bringing together so great a number of facts, it is impossible to avoid some repetition, nor can the order of time be distinctly observed. This part of the note is, as it is called, entirely miscellaneous, and perhaps as *irregular as the subject.* It must have been observed that in Barnaby Barnes' case a survey made on a warrant, which was not only *unsigned*, but no *money paid*, nor the *survey returned*, was not for any of these reasons considered to be illegal, but was adopted as being the *first appropriation* of

the land by the Governor, who was himself one of the proprietaries, and the whole Board of Property, in opposition to a regular warrant and money paid.

The "*irregularities*" of the land office continued for a long time after 1751. "During the long period between the lottery of 1735 and the year 1765, we find no new plan adopted by the proprietaries for the disposition of their lands. * * The pretensions of France, on the Western frontier, began to excite, in 1749, apprehensions of hostility, till, in 1755, the campaign of Braddock, and others which followed, involved the province, for the first time, in warfare with the savages, and produced unexampled confusion and distress. These events tended to divert the minds of the government and people from any particular attention to land affairs, *and things went on* (excepting the partial deviations above mentioned) *in their old and accustomed channels.* In 1763 peace took place between England and France and tranquility was restored to the province."—SERGEANT, pages 53-4.

It was during this period that these so-called "imperfect rights" underwent the change which transformed them from chattels into real estate:

"They were not clothed with the qualities of real estate, but were treated as personal property. As such they were transferred without deed—they were disposed of by executors and administration, and subjected to other rules that govern personal estate. In process of time a gradual change took place; they came to be considered as *real estate*, and the *title* equitable as against the Proprietary, and *legal as against all other persons.* Their modes of enjoyment and transmission were subjected to established rules, and *absorbed into the common system which governs real estate. This change occurred about the year* 1758." SERGEANT, page 51.

As to the nature and character of the estate which grew out of these so-called imperfect rights, we cannot do better than refer to the excellent work of Mr. JOEL JONES on *Land Office*

Titles, chap. IX, page 150—particularly to §§ cl, clv: "In respect to all persons (except the Proprietaries) such a *title is regarded by law*, and, therefore, *is, in truth, legal and perfect.*"

No matter how irregular the method by which a man obtained the permission of the Proprietaries or of their agents to take up land, if he actually acted on the permit and *surveyed* the land, and that survey became known in the office, his *right* was respected, and that right grew into a title.

If he had a warrant for 200 acres, and surveyed 1200, his right to these was specifically recognized and confirmed by the Order of May 1st, 1767.

Judge HUSTON says: "On Aug. 1st, 1766, the office was opened on the new plan, for the West side of Susquehanna on the same terms as on the East side—

"It had been the practice to survey large tracts of land upon Warrants calling for but a small number of acres; fifty acre *Warrants* were usual, and several hundreds had been returned on them. * * * *

"To restrain this practice, the following orders were issued:

April 13th, 1767: * * The Governor orders that no surveys be received consisting of more than 10 acres per cent. above the quantity specified in the Warrant or application."

"May 1st, 1767: * * The Governor is pleased to order, *that as to what is past*, the Surveyor-General receive the returns of the Surveys, though they should exceed the quantities mentioned in the Warrants. *But that for the future*, he strictly charge his deputies that they shall not, &c., &c."

Land Titles, pp. 307-308.

"This order, though so positive and peremptory, does not appear to have produced much effect." *Ibid.*

If the title offered by the Defendants below had been called in question before the Revolution, or in the early days of the Commonwealth, there can be no doubt, it would have been approved and confirmed.

The learned Judges of the *Circuit Court* applied the tests

of the present time, to a title perfected before the rules now in force were known.

At present a junior survey returned takes precedence of an elder one not returned.

Now it is the duty of a warrantee to see that his survey is duly returned, and the failure to make return is punished as his neglect.

In early times exactly the opposite of this was the law.

"In the earlier cases it is held that the neglect of the Deputy Surveyor to make return, as required of him, *does not* in general, *prejudice the party interested.* The reason given is, that he is an officer of the government, and not the agent of the warrant holder."—JONES, p. 61, § lvii.

"It has often been decided that where a Deputy Surveyor makes a survey, and does not return it, the owner of the warrant, or application, shall not be prejudiced by the default of the officer."—TILGHMAN, C. J., in Lessee of McKinzie vs. Crow, 2 Bin., 106.

And again, the same Judge, in Lessee of Lauman vs. Thomas, 4 Bin., 59: "The survey was made by the officer of the Proprietary, whose duty it was to return it to the office of the Surveyor-General, for so he was commanded by the warrant. If he neglected his duty, the purchaser is not to be injured by that."

In the last case the survey was made on a warrant dated 27th April, 1774, and "the Plaintiff gave evidence of a survey made 21st May, 1774. The Defendant made title under a warrant of Dec. 5th, 1774—A survey in Oct., 1775—*returned* 25th March, 1776—and a Patent of 13th June, 1776.

The Plaintiffs' title was held good because of the *actual* survey made in 1774—and this survey was proved by marked lines and corner trees, and "*by an adjoining survey calling for it in the year* 1775."—Vide opinion p. 57.

If, then, a warrant issued and the Deputy Surveyor failed

to return it, the applicant could show that a survey was *actually* made.

It is true that he was required to show something tending to prove, that it was made by an officer; but, he was not required to furnish positive evidence of that fact.

BRACKENRIDGE, J., in McKinzie vs. Crow, 2 Binn, 107, says: "Where a survey has been actually made on the ground, *that is, where traces of a survey are to be found*, I scarcely know anything that has not been admitted, found in the office of a surveyor, that has had relation to it. I might express myself by a strong figure, and say, that almost *the sweepings of an office* had been admitted to go to the Jury to be weighed by them under the direction of the Court."

So, also, any other evidence which *tended to show* that the survey was *known* in the office of the Board of Property, was admissible.

That an adjoining survey called for it was a part of the "strong evidence" referred to by Chief Justice TILGHMAN, in Lessee of Lauman vs. Thomas—*supra*.

In Boyles vs. Johnston's, Exr's, 6 Binn, 124-5, the same learned Judge says: "The warrant calling for the land of Pomeroy, also tended to show that a survey had been made for him."

In that case the plaintiffs claimed under a warrant, Dec. 8, 1774—Survey 24th, Nov. 1775: and a Patent afterwards.

The Defendant claimed under an *application* April 3d, 1769, for 300 acres: *No survey was ever returned.* He offered a manuscript book containing field notes of a former Deputy by which it appeared that this land had been surveyed for Pomeroy in 1773:

A warrant in the name of Moorehead dated 24th June, 1785, *calling for John Pomeroy's land as adjoining*:

An old draught of a survey found in the office of the Deputy on which the name of Pomeroy was endorsed.

Again, same page: "I readily admit that abandonment is a mixed question of law and fact, and that it *will not*, nor *cannot*, be presumed *against the truth of a particular case. Stabit presumptio donec probetur in contrarium* is a sound rule in all the transactions of life."

In *Watson vs. Gilday*, 11 S. & R., 340, DUNCAN, J., repeats the same principles: "Where, after the presumed abandonment, other rights have been fixed, this might be considered constructive abandonment; but *where the survey was duly made —certainly* where duly made and returned—this principle would not apply; no one could be deceived; the land could not be considered as vacant and unoccupied; and any neglect in perfecting the title was a matter solely between the Proprietaries (since the State,) and the holder of the warrant or application, with which persons who are not aggrieved have nothing to do."

And he adds: "The position of the Court 'that if the jury believe that *Jane Little* neglected to pursue her claim from 1769, by *making entry* on the land, *occupying* it, or *paying the State* for it, or *in any other way claiming* the land, as here, she has abandoned her claim, and the land would then return to the Comth. and be open to improvers,' *has no foundation in law*, and is, in my view, pregnant with most mischievous consequences,—removing the land marks of property. This is setting up a new limitation contrary to positive law; and where the contracting parties—the State and the applicant —have come to terms with respect to payment, where the *credit has been extended* by *acts of the Legislature*, and where in giving the extension they have *added their own terms.* * * to say that, notwithstanding all this, the land reverted back to the State * * would be a violation of public faith, and contrary to positive enactments. What is it to Gilday and Watson whether Jane Little has paid her purchase money to the State or not? It is a matter between the State and her, which the State has regulated by law, and on the non-pay-

ment and non-settlement of the land it *does not* become derelict," &c.

Therefore, there can be no pretense of abandonment, in this case, if the offer is true.

It shows a *warrant*; part payment of purchase money; an *actual* survey in pursuance of the warrant; *recognition* by the Board of Property by issuing a later warrant *calling for* this land as an appropriated tract, and by assessment for taxes as early as 1765.

The claim was asserted by *marked lines* on the ground, and by a long line of *recorded conveyances* in which the metes and bounds were set out.

The amount of land—1264 acres—was an amount permitted at the time the location was made; and it was confirmed by the order of 1767, after the tract was recited, and called for in a later warrant; and two years after it was assessed for taxes.

There was not, and there could not be, any possible question between the proprietaries, and the claimants, the predecessors of the defendants below, except the one as to the remnant of the purchase money due.

That was nothing of which plaintiffs could take advantage, as, we think, has been abundantly shown.

"For above forty years past," says YEATES, J., *in Lessee of Biddle vs. Dougal*, 5, Bin., 152, decided in 1812, "ejectments have been maintained on locations and surveys without any part of the purchase money being paid, which clearly evinces the sense of the Courts of Justice, that such rights were not avoided by defect of payment of the stipulated sum, &c."

In that case the survey had been returned.

But in *Boyles vs. Kelley*, 10 S. & R., 214—decided in 1823—there was neither return of survey nor payment of purchase money. An actual survey was proved, by the evidence which had been rejected in *Boyles vs. Johnson's* executors,

supra, (for this is the same title) and Judge GIBSON says, (p. 217) : "The owner having been in no default, the survey is to be considered *as if it had been actually returned.*"

* * *

The right of the Plaintiffs in Error, therefore, hinges on the question, whether a survey was actually made within a reasonable time after the date of the warrant.

The offer is to prove that it "was actually made *immediately* after the date of the warrant," i. e., about the year 1751.

It was not necessary to give, in the offer, the name of the deputy surveyor, who made it. Nor is it of the slightest moment, at this late day, who made it; for we proposed to show, that "*the survey was known* to the proprietaries, and recognized and approved by their officers;" that it was called for by a subsequent warrant; and "was assessed for taxes in 1765-1770, and subsequently."

This made a perfect title against the proprietaries themselves, as early as 1765, at least.

The cases which we have cited show the rulings of the Supreme Court of Pennsylvania as to titles acquired by application and survey after the opening of the land office in 1769, when there was system in the methods of procedure.

Even by these rulings the title offered was a good one.

The offer shows not only a good and perfect legal title in those from whom the Defendants claimed, as early as 1765, but a continuous assertion of title down to the date when Griswold filed his application in 1848. On that date it was "vested in Geisse & Kropff who (had) mortgaged it to the Farmers and Mechanics Bank of Philadelphia."

We do not propose to show, as suggested by the objection of Plaintiffs below, that Griswold's title was an equitable one.

We deny that he had *any* title.

The title to the whole 1264 acres being perfect in Geisse & Kropff, and they having mortgaged it to the Farmers and

Mechanics Bank of Philadelphia, Griswold could not get a title to it by a new application, against Geisse & Kropff. Geisse & Kropff themselves could not destroy their own good title, or abandon it if they wanted to do so. The mortgage bound it. The land was sold on the mortgage, and was bought by the Farmers and Mechanics Bank, under whom the Defendants below claim.

In other words, the 1264 acres were *appropriated* before Griswold filed his application. They were not vacant; and by reason of the rights of the Farmers and Mechanics Bank as a mortgagee, there was no possibility of an *abandonment.*

As there was no *vacant* land, the warrant and all proceedings under it were null and void.

The patent to Griswold based on such a warrant, and survey, was invalid. It gave no estate, for it was based on a nullity.

The officers of the State of Pennsylvania have not the power to make titles to land, except in the manner and on the conditions prescribed by law.—Bixler vs. Baker, 4 Bin., 213.

The granting of a patent is a purely ministerial act—not more than a simple clerical act. It is in no sense judicial.

The patent to Jno. Griswold is dated 27th Oct. 1865, *vide transcript of Record p.* 25, yet Griswold died 10th Dec., 1860, *ibid* p. 16.

In *Bixler vs. Baker, supra,* the lower Court ruled that "*a warrant, survey,* and *patent* were sufficient to vest a good legal title without proof of an actual settlement at the time of taking out the warrant."

The Supreme Court reversed this, and held that the title was not "a good, legal title." It was, only, strong presumptive evidence of a settlement, such as was required by law at the date of that particular warrant.

As said by TILGHMAN, C. J., in Gonzalus et al., vs. Hoover, 6 S. and R., 125, "The law of land titles in Pennsylvania is

singular—I mean of the acquisition of the *original title* from the former proprietaries, or from the Commonwealth. The title under the patent may be controverted by one who claims under an imperfect title, depending on a settlement, warrant, or location, without patent, and then the question will be to whom the patent ought to have been granted by the land office."

The relation which exists between the holder of the legal, and the holder of the equitable title, does not exist between the party to whom a patent in Pennsylvania issues, and the party to whom it ought to issue.

This question, however, was not raised in the Court below. The principles above stated are so fixed, in Pennsylvania, that they have become axioms of the law; yet, because of our "singular" land laws, we may be pardoned for referring to them in this Court.

The "equitable title" meant by the objection of the Plaintiffs to the offer of the Defendants in the Circuit Court was this:

If the 1264 acres were *vacant* land when Griswold applied for a warrant in 1848, then a title made on his warrant and survey would be a good one.

If, again, he were but the agent of Geisse & Kropff—or as the offer says, made an application "for the use of Geisse & Kropff," in whose employ he then was, he would have taken a strictly legal title, and the equitable title would have been in G. & K. Griswold could not possibly have been more than a naked trustee.

This question would, then, have come up: G. & K. had mortgaged this land to the Farmers and Mechanics Bank. If they did not have a title at the time of the mortgage, and got one pending the mortgage, the title inured to the benefit of their mortgagees, whose vendee paid for the patent.

These questions could be raised in Pennsylvania Courts;

and the fact that the title of G. & K. would have been an equitable one, would have been immaterial.

We admit, that in this Court the legal title must prevail. That is settled beyond possible controversy.

Our contention is, that the legal title to the whole 1264 acres was vested in G. & K. *when* they mortgaged the land to the Farmers and Mechanics bank.

The land was appropriated.

There was nothing on which the warrant to Griswold could take effect.

The *survey* was a nullity—absolutely void; and the *patent*, founded on nothing, was itself no better than its foundation.

* * *

We submit, therefore, that the learned Judges of the Circuit Court erred in refusing to admit the whole offer of the Defendants, and in directing a verdict for the Plaintiffs; because:

1st. The warrant to Cookson was an authority to locate, and appropriate land, and according to the custom—the law—of the time, the amount taken up under it in no way affected the warrantee's rights.

2d. The payment of part of the purchase money, at the time of taking out the warrant, 27th August, 1751, was evidence of the intention to locate land, and of the good faith of the applicant; and, as is shown by all the decisions of our Supreme Court, which relate to this period, part payment was as effective to fix the right and title, as payment in full.

3d. The one thing needful to make the title complete in the warrantee, was done—that is, an *actual survey was made on the ground;* and the proof that this survey was known to the proprietaries, and approved by their officers, was equivalent to proof, that it was made by one duly authorized to make it. It was on this point that the learned Judges of the Circuit Court made the error. They treated the rules and principles

--so familiar in Pennsylvania at present--which govern surveys on warrants, issued *since* the Revolution, by the State of Pennsylvania, as if they had been in force when the land belonged to the Penns. There could be no greater mistake.

4th. Not only was a *survey made*, and known and approved, but the land was *actually appropriated*. And the appropriation was so well known that it was assessed for taxes—conveyed by deed—transmuted by public legal proceedings—the title and ownership claimed, and maintained openly, notoriously, without question, for nearly one hundred years before Griswold filed his application for a portion of the tract, and for one hundred and thirty-three years before this suit was brought.

S. HEPBURN, Jr.,
Att'y. for Plffs. in Error.

—so familiar in Pennsylvania at present—which govern surveys on warrants, issued *since* the Revolution, by the State of Pennsylvania, as if they had been in force when the land belonged to the Penns. There could be no greater mistake.

4th. Not only was a *survey made*, and known and approved, but the land was *actually appropriated*. And the appropriation was so well known that it was assessed for taxes—conveyed by deed—transmuted by public legal proceedings—the title and ownership claimed, and maintained openly, notoriously, without question, for nearly one hundred years before Griswold filed his application for a portion of the tract, and for one hundred and thirty-three years before this suit was brought.

S. HEPBURN, Jr.,
Att'y. for Plffs. in Error.

122-441

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 293, October term, 1886.

GEORGE W. PAXTON, et al.,
Defendants below and Plaintiffs in Error,

vs.

CHARLES GRISWOLD, et al.,
Plaintiffs below and Defendants in Error.

Brief of Argument for Defendants in Error.

SAMUEL HEPBURN,
JAMES RYON,
Attorneys for Defendants in Error.

American Volunteer Steam Print, Carlisle, Pa.

BRIEF OF ARGUMENT FOR DEFENDANTS IN ERROR.

It is admitted by Plaintiffs in error that if this land in controversy was not legally appropriated before the date of Defendants in Error warrant of 23d May 1848—survey 26 Dec. 1853 and patent 17 Oct. 1865 they were entitled to recover, and as I understand them, their exception to the rejection of their offer to prove this *legal* appropriation fails. We accept that as the question, and only question in the case, and I do not feel disposed to take the time of this Court in discussing some other matters stated in Plaintiffs' argument which have no reference to the bill of exception. The admission concedes the Defendants in error a perfectly legal title, if their warrant was located on unappropriated land of the Commonwealth and such is the *unquestionable law of Pennsylvania*. The surveying of appropriated land is positively forbidden by statute, and the officials of the Commonwealth as well as others, are trespassers; Hole vs. Rittenhouse 1 Casey 495. Was this land appropriated by the warrant to Thos. Cookson of 26 Aug. 1751? Upon its face, it is a *vague, loose or indiscriptive one*, on which title only commences from the date of the survey, and before that, it may be surveyed on any portion of a larger tract, or circuit of country. If the party has placed his warrant in the hands of the *deputy surveyor*, and he has by a survey reduced its

location to a certainty, before any other appropriation to an adverse claimant, it may, if returned to the surveyor-general's office in season hold the land, and the title dates from the survey—Sergeant's land law 117, 18 and cases referred to in notes (1). In thus early establishing this rule that the warrant must be given to the *deputy surveyor, and he must make the return*, Yeates' justice in the case lessee of Blaine vs. Crawford 1 Yeates R 289 defines applications, to be the inceptions of titles when duly pursued: merely of itself, such a location creates no right, &c. "No title vests thereby, nor does it form any contract, on which the party could be sued by the proprietaries formerly, or by the State now, until a survey has been made designating the parties pretensions by metes and bounds. When followed up with proper diligence it will give a right of pre-emption to the lands described therein, but any location may be forfeited by abandonment or dereliction. Where there has been negligence in obtaining a survey, a subsequent location may by due industry defeat its operation, as to land which it might be supposed to describe with sufficient accuracy and certainty, &c." And he adds p. 290—"no one should be permitted under a general though early application, to thumb the face of a whole country and retard its settlement, and cultivation by his own negligence." Breckenridge J. in McKinzee vs. Crow, cited, says: "In the case of a grant, the parties are three—the grantor or vendor, who in this case, was what are called the proprietaries; the grantee or purchaser, and the officer to carry that grant into effect. The officer is to be considered in the light of an agent for both. He is employed to measure off the land to be transferred, to locate the application, or warrant, &c." In continuing he says: "We have here a document of a survey without authority prior to the act, and without sanction subsequent. There is but the application to rest upon and this without a survey, cannot support ejectment. It is alleged the defendant knew of this survey being made upon the ground. But if the survey made was without authority, and invalid, he having knowledge of it cannot affect it. Even the thinking it good cannot make it good."

In Sergeant's land law of Penna., Appendix H instructions to deputy surveyors in 1701 are given—1st. "Thou shalt faithfully execute every such warrant as shall be directed to thee, to the best of thy skill knowledge and understanding, according to the express words and order of such warrant,

and no otherwise, without special leave first had and obtained from us for so doing." 2nd. "Thou shalt not execute any warrant upon any surveyed lands, or manor or reputed manor lands, or on any other such lands appropriated to the proprietary's use by any former survey, unless such land be expressly mentioned in thy warrant." 4th. "Thou shalt make returns of every warrant directly into the surveyor-general's office at Philadelphia, with a protracted figure of the land exactly performed, and the field work annexed." 5th. "Thou shalt deliver unto no person any draught, plot, figure or field work of his land, before thy return be made into the surveyor's office and be there allowed of." Bond and security required in £200 for the observance of the instructions.

Appendix III—General instructions to deputy surveyors prepared and issued from the Land office in 1765, contain in its 1st. order, the same as printed above in 1701.

In No. 4 of 1765, "you shall make returns of every warrant into the surveyor-general's office, at Philadelphia, with a protracted figure of the land exactly performed, and the field works annexed, and that within six months after the receipt of such warrant or order of survey; but if anything shall happen that the survey cannot possibly be performed within that time, you shall transmit an account, in writing, into the surveyor-general's office, containing the reason of such delay."

V. "You shall not deliver unto any person whatsoever, any draughts, plots, or field works of his land before your return be made into the surveyor general's office and be there allowed of."

These instructions were adopted by the Legislature in the Act of 1st. April 1784—2 Smith's Laws 162. Sergeant's Land Laws of Penna. 60. Moch vs. Astley 13 S. & R. 383.—There is nothing in these instructions to justify a survey by any one but the deputy surveyor—nor him to survey 1264 acres on a 150-acre warrant without "special leave" and if there were any, the surveyor-general's office must show it. The 4th section of this same act, provides the quantity of land granted to any one person shall not exceed 400 acres. These instructions to deputy surveyors and the law of 1784 incorporating them as to duties of officials, as well as of warrantees and settlers form the basis for all titles to land in Penna. as well under the proprietaries, as the Commonwealth. In McMurtrie vs. McCormick 3 Penna. R 431,

the supreme court say: "In this state two modes have obtained, by which, the inception of a right, or title to lands from the Commonwealth may be acquired. "1st. By warrant or location and survey; and 2nd, by an actual, personal, resident-settlement upon the land itself." On page 432 the court continues: "All grants of land by the Commonwealth are put upon record, and are required to be so: and as long as those records are preserved and continue to exist, conclusive evidence of the grant, if any has ever been made, will be found there," and if not "it raises a most violent presumption that no such grant, was ever made." In Roland vs. Long 1 Harris 469, the supreme court say: "An applicant is not bound to look beyond the land office, although a warrant may be signed, and money paid, yet if there is no return of survey in the office, the title under a junior warrant will be good. If he neglects to see to the return of survey for a longer period than *seven* years it is at his peril. He must be content to lose his land, if another applies for it, pays his money and has his title perfected." Emory vs. Spencer, 23 Penna. St. R 276, and Manhattan Coal Co. vs. Green 73 Penna. St. R 320. 1 repeats and adopts these rulings. The warrant to Cookson given in evidence p. 25 Record, is a vague, indescriptive one, and gave *no title until a survey was made upon it by the deputy surveyor of the district to whom it was given*, if ever given, to any one.—This was always the law in Penna. under the Proprietaries, as well as the Commonwealth and I frankly confess, that in this regard, I have never seen or known a case, ancient or modern, that did not assert it, unless, under very special circumstances, sufficient to satisfy the Proprietaries, or the Board of property of the State, that it might, without injury to any one, be dispensed with. Most certainly none of the cases referred to in the argument of Plaintiffs in error establish a different rule, but reiterate and confirm it, though we are told in argument that "the learned judges of the *Circuit Court* applied the tests of the present time, to a title perfected before the rules now in force were known." With the legal learning and large experience in land trials in Penna. involving questions of original title, in very many of them, the remark is at least incautious. No man knows better than Judge McKennan what was the rule in practice under the Proprietaries, as well as the Commonwealth for making and returning surveys on loose, indescriptive warrants. Under both, the rule has never varied—the survey must be made by the deputy

of the district, or some one authorized officially to do it under special leave from the proprietaries or their officers, and if not so made it was void.

The only change in the rule established by the earlier cases, which decided that taking out a warrant and procuring a survey, without more, gives no title to land, was to compel the survey thus made, to be returned into the Land office *within seven years*, and making that length of time if passed, an abandonment; a question of law to be decided by the Court, and not submitted to a jury—Strauch vs. Shoemaker, 1 W. & S. 173.

Under the Act of 1st. April 1782 the surveyor-general was authorized to receive the returns of surveys as shall appear to have been faithfully and regularly made from the late deputies, their heirs and legal representatives for such further time as to him shall seem just and reasonable. This is limited to *seven years* by Strauch vs. Shoemaker—the syllabus of which p. 166 is: "It is essential to the validity of a title founded upon a warrant and survey as against an intervening right, that the survey shall have been returned within *seven years*; for otherwise, notwithstanding the property, which was unseated may have been assessed and the taxes paid by the owner; that he used it as woodland for the purpose of supplying the farm on which he resided with fire-wood, rails and timber; that he claimed title and this with the knowledge of the improver. Yet after the lapse of seven years his right is forever postponed." The earlier cases were put on the ground of *presumptive abandonment*; which of course led to the consideration of surrounding questions of fact, such as payment of taxes, transfers of the title, and claims to possession. But none of the old cases dispensed with an official survey. That was always required to make title, and if there be anything that can be regarded as settled in Pennsylvania, it is, that an inchoate right of a warrantee, may be abandoned and lost to him by negligence, in not having a survey made and returned into the Land office within a reasonable time, (now seven years) from the date of his warrant: Keller vs. Nutz 5 S. & R. 252, Chambers vs. Mifflin 1 Penna. R. 74. Addleman vs. Masterson *id* 454. Starr vs. Bradford 2 Penna. R. 384, and cases cited by Mr. Buchanan in his argument for the Defendant in error. Steinmetz vs. Logan 5 Watts' 518, and opinion of Judge Grier, quoted by Justice Kennedy p. 522. 3, affirmed by the supreme court.

Emery vs. Spencer 23 Penna. St. Rep'ts. 271 and the numerous cases therein cited. McGowan vs. Ahl 53 Penna. St. R. 84. 89. Manhattan Coal Co. vs. Green 73 Penna. St. R. 320 and 321 and cases there cited; and Conklin vs. Westbrook 81 Penna. St. R. 81. In this case upon which the facts had been agreed, there was evidence of marks on the ground, but no evidence to show who made the marks or that a deputy surveyor ever made any official survey on the warrant, &c. The Court goes on to say: "even if the surveys had been made they would not avail defendants, for the reason that they were never returned to the surveyor-general's office." This direction of the Court below was assigned for error p. 84. (of the book referred to), and in affirming the judgment, the supreme court say, p. 85: "No *decision, old or recent*, we think, would have justified the learned judge below in holding otherwise than that the *lapse of time from 1768*, in the case of the application of Abraham Shaler, and from the date of the warrant to Moses Kellam, *in 1793, without surveys returned, even if ever made, and without residence, would be postponed to a junior warrant, dated, surveyed, and returned, in 1851.* That was the defendant's condition under the evidence in this case. *The Court committed no error in any part of the charge, and the judgment is therefore affirmed.*" Justice Huston in delivering the opinion of the Court in Chambers vs. Mifflin Penna. R. 74, 78, says: "The doctrine of our courts has not been well understood, for when it is said, a precisely descriptive warrant gives title from the date, a vague one from the time of survey, &c., it is sometimes added, and always understood *provided it is otherwise followed up with reasonable attention.* It is not, and never was the law, that on taking out a warrant, and procuring a survey and then negelcting and refusing to pay the surveyors fees, which was always necessary to procure a return, that a man could hold the land without attending to it in any way for an indefinite length of time. Although a warrant *has been surveyed, yet if not returned the owner may change its lines, or change its place altogether, and lay it on any other vacant land anywhere near: until it is returned, the State has no power to collect arrears of purchase money. It never can be that a man can wait thirty or forty years, and all that time be able to say this is my land if I please, and not mine unless I please.* I will take this land and pay the State for it, if the country improves and it rises in value, &c." I respectfully refer the Court to this case as a complete an-

swer to Plaintiffs in error. The offer does not propose to give evidence of an *official* survey upon this warrant, and without that, not one *spark of title vested in Cookson against the Proprietaries or the Commonwealth.* It is conceded that if a proper survey had been made, and the purchase money paid to the Receiver-general of the Proprietaries, a title might have been perfected before the 3rd October 1765. But the offer carefully guards that the survey offered to be proved, shall not be that of a deputy in the district, which the law required, but a survey by any one, and for any one, and that too, only by marks on the trees, made by who knows? whether hunters, or wood-choppers, land claimants who wanted to keep their neighbors and settlers at a safe distance, or by one who kept, as described by Justice Yeates in Blaine vs. Crawford; by Justice Huston in Chambers vs. Mifflin, "held for a rise," or by Justice Kennedy in McMurtrie vs. McCormick, "the man who takes or attempts to take, possession of land belonging to the Commonwealth, and unappropriated, for the purpose of preventing others from settling, &c., acts in violation of all laws, and trespasses upon the rights of the Commonwealth." Upon the warrant given in evidence, what claim could the Proprietaries, or the Commonwealth have for the purchase money, or any part of it? There is no land designated and known by any survey in the surveyor-general's office to which the lien could attach. Will it be seriously contended that 1264 acres of land can be held as against the Commonwealth, or its grantee on this 150 acre warrant, without some return of the work appropriating it, being brought officially to the notice of the proprietaries, and show their approval of it? The statement of the proposition furnishes the answer, and we are not surprised, that no decission "*ancient or modern*" can be found to sustain it. Nor does it propose to show a return of survey, at any time, or give a reason for its non-return, which is, and was indispensable, both under the Proprietaries and the Commonwealth. In Chambers vs. Mifflin 1 Penna. R. 78, 9 and every decision on the same subject since, until the present hour, not offering an official survey, makes the offer simply to prove a survey without authority, which could not be done at any time." Wilson vs. Stoner 9 S. & R. 39—"A *survey is not evidence without showing an authority to make it*, or proving that such authority existed, and was afterwards lost. *Possession* for upwards of 30 years under a survey found in the hand writing of an assistant deputy sur-

veyor, indorsed "copied for return," with a memorandum by him that there was authority to make it, the lines of which survey are marked on the ground, is not sufficient to presume a warrant or authority." We refer the Court to the argument of Crawford p. 40, for a collection of all the earlier cases, and the opinion of Duncan, who delivered the opinion of the Court. In Manhattan Coal Co. vs. Green, 73 Penna. St. R. 310 the authorities on this subject are again collected in the very able argument of F. B. Gowen, and the supreme court reassert it. Agnew J. who delivers the opinion of the Court p. 320, says: "A survey without a warrant is void, since the proprietary government and customs have ceased to exist, excepting surveys allowed to actual settlers under the act of 3d April 1792. Under the Penns, surveys were sometimes made without a precept, and the custom to receive them has been permitted to be proved: Woods vs. Galbreath, 2 Yeates 306. But since the divesting act of 27 Nov. 1779, the practice *has not been allowed*: Barton vs. Smith 1 Rawle 403. Rogers J., delivering the opinion of the Court, p. 406, says: "The mischief which resulted from surveying lands, without authority, was felt at an early day. To remedy the evil which in practice prevailed to a considerable extent; as early as 3d October 1765, the proprietary government made an order by which they expressly prohibited the deputy surveyors from surveying any of the proprietaries' vacant, or unappropriated land whatever, on any ticket or order from any person but the surveyor-general; nor were they to survey any land, unless they had a copy of a *regular warrant*, or application, *numbered*, and to them directed by the surveyor-general himself, or by his order. The same policy, and for the same reasons, has been pursued under the Commonwealth, as appears from the acts of 3 Apr. 1785, and of the 3d Apr. 1792. The case of Woods vs. Galbreath referred to gives the usage prior to 1765, and will be found vastly different from that embodied in the bill of exceptions in this case. The Plaintiff in that case claimed the land under a settlement made in 1744, two surveys by a deputy employed by Thos. Cookson, deputy surveyor of the district in 1745. Receipt for the payment of the purchase money of Lynford Lardner, Receiver-general, by the hand of Thos. Cookson 24 May 1746; £17, 18s; and a second receipt of Edmund Physic, Receiver-general for £30 on account, of his land, a warrant to himself for 235 acres including his improvement, and a survey made by Thomas Cookson, deputy

in 1745 for his father: a resurvey by Wm. Lyon, containing 258 acres, on 31 October 1771; and his father's will. The defendant claimed under a warrant to his father Jas. Galbreath for 150 acres adjoining his dwelling plantation, dated 15 April 1763, a survey of 222 acres on 2nd June 1763, and patent dated 12 Nov. 1763; and his father's will. The Board of Property on a hearing, the 29 May 1775, rejected part of the original survey, the same being said, not to have been returned, and made without warrant, he having no improvement thereon. The Court on the trial permitted the Plaintiff to prove the general usage of the Land office in reference to what had been done for the Plaintiff, and of the deputy surveyors in that district in early times, in making surveys, &c., on payment of £5 per hundred acres being paid to such deputies besides the surveying fees—that such surveys thus made had uniformly been sanctioned by the Commissioners of property, &c. In the Manhattan Coal Co. vs. Green the Court continue to say, p. 320 "The importance of notice of pre-existing rights to those who take up lands from the Commonwealth cannot be over-rated, and is strongly set forth by Judge Rodgers in Roland vs. Long," and by Judge Woodward in Emory vs. Spencer, to which cases we have already referred. Emery vs. Spencer repeats the strong language of Judge Huston, in Chambers vs. Mifflin, and that after *seven* years, the presumption of abandonment, &c, becomes a conclusion of law; "payment of purchase money does not excuse a man from *making survey and return of warrant*, &c.; the rule which holds warrantees to reasonable diligence, is founded not only in the interest the Commonwealth has in the purchase money, but mainly in the public policy which demands clear ascertainment and record notice of what land has been appropriated, and by what metes and bounds it is claimed, &c.; therefore it is as applicable to the warrantee who has paid for his lands, as to him who has not." Page 277 continues the opinion, "the payment of taxes and the sale of the land as unseated do not help the title of the warrantee, Strauch vs. Shoemaker, &c., "nor does the fact that Spencer had notice of Emery's warrant weigh a feather in the case. Notice that a man has held a warrant more than thirteen years without a survey, if anything, is notice that he has abandoned the land described in it, and is an invitation to the world to come and take it." The cases collected in Smith's notes vol. 2 land laws of Penna. p. 188-9 and 90 cited many of the earliest cases, and establishes beyond con-

troversy, that our Supreme Court in the later cases from 1829 have not changed the rule as to diligence in having a survey made and returned to the Surveyor-General's office, page 189, Yeates J, "the real survey must be returned into the office of the surveyor-general. The time when the survey was returned, becomes important to the true decision and it lays on the Plaintiffs to show it satisfactorily. Unless there has been an actual survey, and that too returned before the Defendant's warrant of acceptance, the Plaintiff is not entitled to recover. I agree there must be something more than an *actual survey by the deputy*, to vest the equitable interest on a removed application. But it has been *always understood* that on an indiscriptive location, wanting precision in its terms, the *interest vests from the time of survey*," Smith J, such has been the *invariable rule on vague warrants or applications*." In a subsequent case, same page, tried in 1800 before Shippen, C. J. and Yeates J. the C. J. in delivering the opinion of the Court says: "The fatal exception to the Defendant's title consists in his not obtaining a return of his survey into the surveyor-general's office which was executed on grounds different from those called for in his application. The due diligence of persons who take up lands in this mode, forms an essential feature in constituting their rights. Hence where negligence occurs, a subsequent order of survey, industriously followed up, may defeat the operation of a former one, which, in the due course of business, might be supposed to describe the lands with convenient precision and certainty. *It lies in the power of no individuals to lock up the Land office against the settlement of the country; or other applicants by their willful neglect and delay.*" The warrant to Cookson is as vague as it can be, and without its location, as said by C. J. Shippen, in the case quoted in reference to shifted survey: it has always been deemed essential that return of such should be made in a reasonable time, in order to prevent others from bestowing their labor and money in a fruitless pursuit of the same lands. Without such constructive, or actual notice, what footsteps remain in the proper offices, to guide the inquiries of subsequent applicants?" An examination of all the earlier cases as well those cited by Plaintiffs in error as those collected in the references we have given show something very different from the present offer. In very early times there was but little difference in the titles, and in almost every one of them some possession was alleged to supply the want of a

return of survey. Huston J. in Chambers vs. Mifflin p. 78. "Though it was most palpable, that the reason for indulging a person in not getting a survey returned in 1774 or 5, was no reason at all for indulging him after 1790. The deputy surveyors, before the war, had died, had removed, or were superannuated. Their papers were scattered, some of them displeased at not being in office, and their refusal to return surveys was some excuse. Since the war their bonds could have been issued, or the Board of property would have compelled them to have returned surveys."

We take it to be a most serious misapprehension of the land law of Penna., either under the Proprietaries, or the Commonwealth to suppose, that an *indescriptive*, or *vague warrant*, without some official survey upon it, found either in the District surveyor's office, accompanied by actual residence upon the land described in that survey, and proof of payment of the surveyors' fees by the warrantee, or an official copy of the survey made and returned into the surveyor-general's office was ever sustained after the lapse of *nearly one hundred years* after the date of his warrant, as against a subsequent warrantee, survey, and patent from the Commonwealth. We confidently assert that no such claim was ever sustained by any court in Penna., and *certainly* not one of the cases cited, or books referred to in the argument give it any support.

The case of McKinzie vs. Crow, 2 Bin. 105.6. The paper offered was found among the deputy-surveyor's papers, and purported to be executed by an assistant of the deputy, but was rejected by the court because made by the assistant McKinzie who was interested, and no evidence that the principal had it in his office, or that his fees had been paid him. The case referred to 2 Yeates 306. would seem to show that Thos. Cookson the warrantee in the warrant admitted in evidence was District surveyor in the district in 1746 within five years of the date of the warrant, and if he continued to be so, it may be a solution of the question, why no return into the surveyor-general's office of a survey of 1264 acres on his 150 acre warrant was made.—This warrant p. 25 Record, plainly sets forth the agreement of the parties when issued 26 Aug. 1751 and expressly stipulates the price and time when the warrantee shall pay for the land which he is to locate to fill it. Upon the face of this paper, and it is all that we have, there is no room for conjecture as to what is to be paid, and when it shall be paid. The offer of payment

of purchase money by Thos. Cookson is met by what? The production of an "extract from Ledger" p. 26 Record. "Thomas Cookson Dr. 1751, Aug. 27. 44. To land (2 W. S.) on Yellow Breeches creek 43. *Contra* Cumberland, Cr. 1751 Aug. 27. 44. By cash ten pounds £7 10. 54 £17 10." This is all that is given in evidence under the admitted offer to let them prove payment of purchase money, and is quite as deficient as the offer of a survey not official. On reading the warrant it is for "150 acres of land *on a branch of Yellow Breeches*, in the said county of Cumberland." The Dr. is "To land (2. W S.) *on Yellow Breeches creek* 43. The *Contra*, Cumberland Cr. By cash £10 and £7 10— 54 £17 18. As we have said, there was no room for conjecture either *as to price, or time of payment* on the warrant. What is there in the entry to show the payment a special one, on this warrant? the amount was not sufficient to pay the price stipulated, and the Cr. is a general one, "*Cumberland Cr.*" Not a word to indicate that the time for payment agreed upon in the warrant, was changed, that the price was reduced, or that the Cr. was on account, nor is it to Cookson personally. Payments for land on applications, and warrants were not made in this way under any government that ever existed in Penna. Payments for land were made to the Receiver General and passed through his office, and later to the Treasurer and their receipts the evidence of them, see 2 Yeates 306 before referred and 5. W&S 76. Never, we think, was it ever before attempted, as here, to show payment by warrantee for his warrant, by an entry in a Ledger, that upon its face, makes no reference to the warrant, but shows an entry at the same place, that what ever was intended by the first, was used later for patenting 216 acres, 31 perches to Mt. Holly Paper Co. 21st. Aug. 1874. The practice of deputy surveyors proved in Wood vs. Galbreath, of taking £5 per 100 acres and their fees, and carrying the money to the land office, we think, furnishes a much more satisfactory reason for the Dr. and Cr. shown. Be this as it may, it is no evidence of payment of the purchase money agreed to be paid on that warrant. A warrant without an *official* survey, by the officer to whom it was directed, with no return of any kind upon it for *one hundred and thirty-three years from its date!* can scarcely be supported by such an unexplained "*Extract from Ledger*" as this, to prove the actual payment of the purchase money. We have then a warant *ninety-seven years old*, when Griswold applied

for, and obtained his: *133 years old*, when this case was tried; without evidence of an *official survey or any return of survey* into the surveyor's general office, attempted to be upheld by the "Extract from Ledger" for the payment of the purchase money, and this seriously pressed upon this Court as establishing a title better than the defendants in error which should in law defeat their recovery. No case has been shown that approaches this remarkable pretension, and we hazard nothing in saying, none such ever existed. Failing to prove the official survey, payment of the purchase money and return of the survey; not one spark of title vested in the warrantee, that could be either taxed, to the prejudice of the Commonwealth, or sold by one individual to another, we care not how often, that could be used as scaffolding to defeat the paramount right of either the proprietaries or the Commonwealth. Title out of the Proprietaries, or the Commonwealth must be shown to defeat either, or one claiming under them. 2 Wash. C. C. R. 475,—95 Penna. St. R. 205—300. A *subordinate* title never can defeat a *paramount* one. The right of Plaintiffs' in error *does not* "hinge" as claimed in argument p. 14 "on the question, whether a survey was actually made within a reasonable time after the date of the warrant, but upon the question, whether an *official survey* was made, and whether *that* survey was returned to the Surveyor General, or into the land office as required by the instructions to district surveyors, and adopted by the Legislature in the act of 1. April 1784 before cited. The name of the "deputy surveyor who made the survey," was *not* required to be stated; but the offer of a survey filling the warrant on which it is made, *must be an official survey*; and the *knowledge* to effect either the proprietaries or the Commonwealth must be knowledge derived from their officials by "a protracted figure of the land exactly performed, and the field work annexed," returned into the surveyor-general's office at Philadelphia within six months after the receipt of such warrant, and if not so returned, the reasons in writing for the delay. Will it be pretended that the offer fills these requirements? "A return of unseated lands (as this in controversy was, and is) to the county commissioners for taxation, is not evidence to show title in the party making such return," Urket vs. Coryell—Wasser vs. Same, 5 W. & S. 61. And until out of Commonwealth not taxable at all on which to found title, Emery vs. Spencer, 23 Penna. St. 277. We say, and the C. C, said the offer shows

of purchase money by Thos. Cookson is met by what? The production of an "extract from Ledger" p. 26 Record. "Thomas Cookson Dr. 1751, Aug. 27. 44. To land (2 W. S.) on Yellow Breeches creek 43. *Contra* Cumberland, Cr. 1751 Aug. 27. 44. By cash ten pounds £7 10. 54 £17 10." This is all that is given in evidence under the admitted offer to let them prove payment of purchase money, and is quite as deficient as the offer of a survey not official. On reading the warrant it is for "150 acres of land *on a branch of Yellow Breeches*, in the said county of Cumberland." The Dr. is "To land (2. W S.) *on Yellow Breeches creek* 43. The *Contra*, Cumberland Cr. By cash £10 and £7 10— 54 £17 18. As we have said, there was no room for conjecture either *as to price, or time of payment* on the warrant. What is there in the entry to show the payment a special one, on this warrant? the amount was not sufficient to pay the price stipulated, and the Cr. is a general one, "*Cumberland Cr,*" Not a word to indicate that the time for payment agreed upon in the warrant, was changed, that the price was reduced, or that the Cr. was on account, nor is it to Cookson personally. Payments for land on applications, and warrants were not made in this way under any government that ever existed in Penna. Payments for land were made to the Receiver General and passed through his office, and later to the Treasurer and their receipts the evidence of them, see 2 Yeates 306 before referred and 5. W&S 76. Never, we think, was it ever before attempted, as here, to show payment by warrantee for his warrant, by an entry in a Ledger, that upon its face, makes no reference to the warrant, but shows an entry at the same place, that what ever was intended by the first, was used later for patenting 216 acres, 31 perches to Mt. Holly Paper Co. 21st. Aug. 1874. The practice of deputy surveyors proved in Wood vs. Galbreath, of taking £5 per 100 acres and their fees, and carrying the money to the land office, we think, furnishes a much more satisfactory reason for the Dr. and Cr. shown. Be this as it may, it is no evidence of payment of the purchase money agreed to be paid on that warrant. A warrant without an *official* survey, by the officer to whom it was directed, with no return of any kind upon it, for *one hundred and thirty-three years from its date!* can scarcely be supported by such an unexplained "*Extract from Ledger*" as this, to prove the actual payment of the purchase money. We have then a warant *ninety-seven years old*, when Griswold applied

for, and obtained his; *133 years old*, when this case was tried; without evidence of an *official survey or any return of survey* into the surveyor's general office, attempted to be upheld by the "Extract from Ledger" for the payment of the purchase money, and this seriously pressed upon this Court as establishing a title better than the defendants in error which should in law defeat their recovery. No case has been shown that approaches this remarkable pretension, and we hazard nothing in saying, none such ever existed. Failing to prove the official survey, payment of the purchase money and return of the survey; not one spark of title vested in the warrantee, that could be either taxed, to the prejudice of the Commonwealth, or sold by one individual to another, we care not how often, that could be used as scaffolding to defeat the paramount right of either the proprietaries or the Commonwealth. Title out of the Proprietaries, or the Commonwealth must be shown to defeat either, or one claiming under them. 2 Wash. C. C. R. 475,—95 Penna. St. R. 205—300. A *subordinate* title never can defeat a *paramount* one. The right of Plaintiffs' in error *does not* "hinge" as claimed in argument p. 14 "on the question, whether a survey was actually made within a reasonable time after the date of the warrant, but upon the question, whether an *official survey* was made, and whether *that* survey was returned to the Surveyor General, or into the land office as required by the instructions to district surveyors, and adopted by the Legislature in the act of 1. April 1784 before cited. The name of the "deputy surveyor who made the survey," was *not* required to be stated; but the offer of a survey filling the warrant on which it is made, *must be an official survey*; and the *knowledge* to effect either the proprietaries or the Commonwealth must be knowledge derived from their officials by "a protracted figure of the land exactly performed, and the field work annexed," returned into the surveyor-general's office at Philadelphia within six months after the receipt of such warrant, and if not so returned, the reasons in writing for the delay. Will it be pretended that the offer fills these requirements? "A return of unseated lands (as this in controversy was, and is) to the county commissioners for taxation, is not evidence to show title in the party making such return." Urket vs. Coryell—Wasser vs. Same, 5 W. & S. 61. And until out of Commonwealth not taxable at all on which to found title. Emery vs. Spencer, 23 Penna. St. 277. We say, and the C. C. said the offer shows

no title in Plaintiffs in Error, and the warrant to Jno. Griswold p. 23 Record shows who applied and who paid the purchase money. There can be no dispute, but that warrant survey and patent vested the whole estate of the Commonwealth in the tract of land described in it, in Griswold and his heirs. Urket vs. Ceryell cited *supra* 82 decides that a survey shown to be made at the instance and for the use of another person, who had no interest in the warrants, was the property of warrantees, &c. But if as intended in the offer they were taken for the use of Geisse and Kropfl, it was a use that could only be asserted on the equitable side of the Court. The lengthy and labored argument of plaintiffs in error, it seems to us, most signally fails to show, either by the offer, or evidence admitted under it a "*legal* title to the whole 1264 acres in them." On the contrary every decision from the earliest times until the present convincingly proves, that as against the Commonwealth or its grantee, they have no title at all. It is said, *the land was appropriated*. As against the Commonwealth's grantees, how? Appropriating wild, unseated land as this was, could only be appropriated by a survey made on the ground and returned to Surveyor-general. No such survey by a District Surveyor was ever made, or returned. On the contrary no official survey of any kind was offered, and the warrant to Cookson was never executed, and failed to divest the title of the proprietaries, and none shown by plaintiffs in error out of the Commonwealth prior to that of defendants in error, and no estate vesting in either Cookson or his grantees under whom plaintiffs in error claim, and nothing in either by virtue of this old warrant upon which the lien of a mortgage or judgment could attach the purchasers at sheriffs' sale, nor either of them, took anything by their purchases.—Philips vs. Zerbe Run Co. 25 Penna. St. 56. The interest to be bound by the lien of a judgment must be an *estate in the land* per Gibson C. J. in Morrow vs. Brenizer 2 Rawl 188. re-affirming Allison vs. Wilson 13 S. & R. 330 and following Craig vs. Leslie 3 Wheaton 563 and Garver vs. McNulty 39 Penna. St. R. 473, 483. Thompson J. says more than 7 years after the survey was made and unreturned, Culbertson entered on the land in controversy, *as a settler*. The failure to return the survey from 1794 to 1832, *left the land open to new appropriation by settlement or otherwise*. There are numerous decissions to this effect which need not be cited. A sale by execution on a judg-

ment against the warrantee, or one claiming under him, gave no title, and as against the paramount title of the Commonwealth or its grantee an absolute nullity. The claim of legal title to 1264 acres of land on the warrant for 150 acres under the facts stated in the offer p. 13 of argument, has not one authority for its support, and never had. In Blair vs. McKee 6 S. & R. 201 Duncan J. says: "The right of the plaintiff to survey 695 acres on his warrant (including his improvement made in 1775) of 360 acres, which survey remains *unreturned*, against the Defendant's subsequent warrant, survey and possession, *can never be supported*." As early as 1765, under the proprietaries, Deputy Surveyors were forbidden to survey *more than ten per cent.* over and above the quantity mentioned in the warrant, Sergeant's land law p. 270. If, as argued p. 16, the legal title to the whole 1264 acres vested in G. & K. when they bought from and mortgaged to the Bank. It seems strange to us, that Kropp should feel that it was necessary for him to apply for, and take out a warrant for part of it early as 23 May 1848; the same day Griswold applied for and obtained his warrant. The truth is, that all knew this land was unappropriated land of the Commonwealth: But being woodland, wholly uncultivated, no one claiming but furnace men for timber and coaling wood, it was regarded as of little value, until a railroad was run through it, and as said in argument, ore found upon it, long since the date of Griswold's warrant.

SAMUEL HEPBURN,
JAMES RYON,
Attorneys for Defendants in Error.